Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term 1972

No. 71-1043

SAUL HELLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals, State of New York
Petition for Certiorari filed March 1, 1972
Certiorari granted May 15, 1972

APPENDIX

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FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

Transcript of Proceedings

CRIMINAL COURT OF THE CITY OF NEW YORK
PART 2B3, COUNTY OF NEW YORK

- -

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

SAUL HELLER, et al.,

Defendants.

- -

Docket Nos.
B19858-B19859
B19860

Charges:
235.05

Trial.
Sentence.

COURT REPORTER'S MINUTES

New York, New York
September 16 and 17, 1969

Before:
HON. WILLIAM E. RINGEL, (Presiding)
HON. BERNARD MOLDOW,
HON. MORTON R. TOLLERIS,

Judges, Criminal Court.

Transcript of Proceedings

Appearances:
(Defendants)
For the People:
RICHARD BECKLER, Esq.
Assistant District Attorney,
County of New York.

For the Defendants:
JOEL H. WEINBERG, Esq.
1465 Broadway
New York, New York

Jerome Oppenheimer, CSR
Official Court Reporter

Transcript of Proceedings

[2]I N D E X

WITNESSES AND EXHIBITS

WITNESS	DIRECT	CROSS
Arthur H. Goldberg	9	12
Charles Smyth	20	35
Parker Tyler	67	81
Charles Winick	94	104
Thomas Phillips	136	140
Saul Heller	173	179

EXHIBITS

PEOPLE'S	DEFENDANT'S	DESCRIPTION	PAGE
1		Plastic container with 3 reels of movie film	35
	A	Book, entitled Sex Psyche et cetera In The Film	92

Transcript of Proceedings

[3]September 16, 1969

Court Officer Joseph Hughes: Calendar Number 62, Docket B19858, Saul Heller, Susan Epstein, and Mark Kern, charge obscenity by Deputy Inspector Charles Smyth.

The Defendant's Counsel: (giving appearance) Joel H. Weinberg, 1465 Broadway.

The District Attorney: Before trial commences, the People have a motion to make.

The Presiding Judge: Sure.

The District Attorney: Before trial commences, the People have a motion to make as to two of the defendants present before the Court.

The Presiding Judge: Yes?

The District Attorney: As to the defendant Susan Epstein and the defendant Mark Kern, the District Attorney having conferred with their defense counsel will move to dismiss the charges against those two defendants, in view of the fact that we would be unable to prove their guilt or knowledge beyond a reasonable doubt.

The Presiding Judge: Heller and Epstein?

[4]The Defendant's Counsel: No, Kern and Epstein.

The District Attorney: Kern and Epstein, Your Honor.

The Presiding Judge: Kern, all right. Kern and Epstein, dismissed, motion of the D.A.

The Defendant's Counsel: Thank you, Your Honor.

The Presiding Judge: All right.

The Defendant's Counsel: Your Honor, the defendant Heller is ready for trial. Prior to trial, in accordance with my discussions had with Mr. Conboy, Mr. Weinstein and Mr. Beckler, I have reserved all motions for this trial court, and I would like to be heard on motion to dismiss.

The Presiding Judge: I don't know what that means, Counsel, reserved all motions to this trial. If you have any interlocutory motions, like motions to suppress, it is better practice, and preferable as far as this bench is concerned, that you clear the decks of those things before we actually go into trial.

[5]The Defendant's Counsel: I would ordinarily —

The Presiding Judge: The Code of Criminal Procedure so provides, and I will not, this Court will not be bound by any agreement you make with the D.A., or anybody else.

The District Attorney: Your Honor, it was my understanding that this case was ready for trial today.

The Presiding Judge: That was my understanding. If you have any understanding to the contrary, I would like to see it in writing.

The Defendant's Counsel: I have no such understanding to the contrary, Your Honor, but within the confines of the Constitution, and let me just finish one sentence, Your Honor, please, that the motion in this type

of action is preferable at the time of trial because there is no modus operandi--

The Presiding Judge: What provision of the United States Constitution says that?

The Defendant's Counsel: The provision as follows, that there is no effective modus operandi [6] in the Code of Criminal Procedure which is built in, in the case of a deprivation of a right, where a defendant can make a motion to suppress and then get a speedy trial within the regular purview of the law as it stands now.

Accordingly, I would ask that I be heard on this motion even if it is denied.

Judge Moldow: Is there a motion to suppress?

The Defendant's Counsel: It is to dismiss.

Judge Moldow: To suppress?

The Defendant's Counsel: To dismiss.

The Presiding Judge: On what ground?

The Defendant's Counsel: The ground that the statute is unconstitutional, and that there has been prior, no prior judicial determination in an adversary proceeding prior to this trial, number one.

Number two, that there are no papers on record here which would reflect any adverse determination even by affidavit.

[7]The Presiding Judge: I don't know what that means, no adverse, I don't understand that.

The Defendant's Counsel: All right. The courts of this country have held, in some states--

Transcript of Proceedings

Judge Moldow: Counsel, Let me--

The Defendant's Counsel: May I submit a memorandum of law?

Judge Moldow: Just a minute. Why can't these applications be made at the end of the People's case?

The Defendant's Counsel: I will make them at the end of the People's case.

The Presiding Judge: All right, nothing wrong with that.

The Defendant's Counsel: May I just submit a memorandum of law for the Court?

The Presiding Judge: Yes, we are always happy to read memorandum of laws. We don't get too many of them.

(Defendant's counsel hands to the Court.)

The Presiding Judge: Yes, sir?

The Defendant's Counsel: The defendant is ready for trial.

[8]The Presiding Judge: All right, let's go on, start the trial and see what we develop, and make your motions accordingly.

The District Attorney: The People are ready and call Inspector Smyth to the stand--excuse me, Justice Goldberg to the stand.

The Defendant's Counsel: Before Judge Goldberg, may I also hand up to the Court, although it is in my handwriting, a decision that came out of the Federal Court yesterday with regard to the memorandum of law? I have spoken to the District Attorney --

The Presiding Judge: What case is that?

The Defendant's Counsel: The name of the case is Natale v. The Municipal Court of the City and County of San Francisco, which

was decided August 29th, by U.S. Federal Judge Napoli of San Francisco.

Judge Moldow: That a motion picture case?

The Defendant's Counsel: Absolutely a motion picture case, and I have a Xerox copy of the Variety article which I clipped out of Variety, [9] plus my telephone communication with the Judge.

The Presiding Judge: Did Variety publish it in English this time?

The Defendant's Counsel: Yes, I think they did.

The Presiding Judge: They have a language of their own, if I remember correctly.

Judge Moldow: Would you raise your right hand? (Witness complies) Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

The Witness: I do.

Judge Moldow: Be seated. Name, address, and occupation? Keep your voice up.

The Witness: Arthur H. Goldberg, 100 Centre Street, New York, New York, 10013. I am a Judge of the Criminal Court of the City of New York.

JUDGE ARTHUR H. GOLDBERG, witness called on behalf of the People, occupation Judge of the Criminal Court, City of New York, having been first duly sworn by Judge Moldow, testified under oath as follows:

Transcript of Proceedings

Direct Examination by the District Attorney:

[10]Q. Judge Goldberg, on July 31st, 1969, at approximately four o'clock that afternoon, did you have an occasion to see a movie entitled A Blue Movie? A. I did. As I recall it, the time was 3:40 p.m.

Q. Where did you see this movie at? A. At the Garrick Theatre on Bleeker Street in Greenwich Village, New York.

Q. After having viewed this movie, did you have an occasion to sign any arrest warrant for any parties involved in that movie? A. I did. I saw the entire movie, I think it ran from 3:40 until about 5:15 or 5:20, and then a few minutes after that, I think it was about 5:25, my recollection, p.m., I signed a warrant of arrest.

Q. Whom did you sign the arrest warrant for, was it in anyone's name, Your Honor? A. As I recall it, those were John Doe and Jane Doe names.

Q. What was your — And why did you sign these arrest warrants? A. I had seen the film, and it was, and is my opinion that that film is obscene, and was obscene [11] as I saw it then under the definition of obscene, that is in quotes, section 235.00 of the Penal Law.

The Presiding Judge: Was there an affidavit submitted to you by somebody?

The Witness: There was an affidavit, the complaint--

The Presiding Judge: An affidavit complaint?

The Witness: The typical--the complaint in this case signed by Inspector Smyth, and he swore to that complaint.

The Presiding Judge: And based on that, you signed the warrant, that also was included as the basis for your signing the warrant?

The Witness: That is correct.

The Presiding Judge: That was--

The Witness: (interjecting) - that the affidavit was before me right after the movie, it was submitted to me.

The Presiding Judge: And you signed--the warrant was an arrest warrant?

The Witness: That is correct. I think it was a formal bench warrant, I struck out the word [12] clerk and put my name on it.

The Presiding Judge: All right.

Q. And what time did you sign these warrants, sir? A. That was at 5:25, that is my recollection, and that has been refreshed by looking at the --

Q. (interjecting) Do you have the warrant here? A. The warrant or copy of the warrant, but it is my independent recollection, at any rate, I remember it was at 5:25 or 5:30 , no later.

The Presiding Judge: Yes.

Q. That was on the same date? A. Yes, immediately after.

The District Attorney: I have no further questions of the witness at this time. Any cross?

The Defendant's Counsel: Oh, yes.

Cross-Examination by the Defendant's Counsel:

Q. Your Honor, on the day that you signed the search warrant, you went to the Garrick Theatre, is that correct? A. That is correct.

Q. What caused you to go to the Garrick Theatre? [13]A. Well, the District Attorney had asked me to go, and Inspector Smyth was also present, and I agreed to accompany them.

Q. Now, when you say the District Attorney asked you to go, was there any formal papers that the District Attorney submitted to you to go to the theatre?

Judge Moldow: You mean motion papers?

The Defendant's Counsel: Written papers of any sort, Your Honor?

The District Attorney: Your Honor, I would object to that question as not being clear exactly.

The Presiding Judge: Well, did you go pursuant to some court order or direction or written request by the District Attorney?

The Witness: No, there was an oral request by Assistant District Attorney, Richard Beckler.

Q. Now, when Richard Beckler made that oral request, was that in the presence of Detective (sic) Smyth?

The Presiding Judge: Inspector Smyth.

The Defendant's Counsel: I am very sorry.

Q. (continuing) Inspector Smyth? A. No, it was not.

[14]Q. As a result of this request, did Mr. Beckler go with you to the Garrick Theatre? A. No, he didn't. He told me that he had seen it the day before.

Q. And, Mr. Beckler turned over to you no written documents asking you to go to the Garrick Theatre, is that correct? A. That is correct.

Q. Now, when you got to the Garrick Theatre, you went there with Inspector Smyth, is that correct? A. That is correct.

Q. Is that accurate, Your Honor? A. That is correct.

Q. When you got to the Garrick Theatre, did you notice any signs at the Garrick Theatre indicating an age at which a person had to be admitted? A. I didn't check the signs outside, and I don't recall that the picture opened with any writing. There was no M or whatever symbol is now used. There may have been at some point,

I didn't see it. I say at some point it may have been at the very end, and I am not sure that I waited until the lights went up; [15] I saw the end of the film but whether any credits came or at any rate the warning, if there was one on the film, was not -- would not have been until the end, however, that had no part or bearing on my determination.

Q. Your Honor, was there any warning at the ticket booth as to the age that people had to be when they entered the theatre? A. I certainly don't recall that. I didn't look. I was interested in, to see what the movie would be, to see whether in my opinion, it came within the statute, within the prohibition of the statute.

Q. And, Your Honor, did you pay $3 to enter the theatre? A. Inspector Smyth bought two tickets, and I did not pay. I saw this gratis.

Q. If I were to tell Your Honor, right at the situs where there is a ticket booth--

The Presiding Judge: It would be completely inadmissible.

The District Attorney: It would be objectionable.

Q. Now, Your Honor, while you were at the theatre [16] and observed this picture, did you have any discussions with Inspector Smyth with regard to the picture? A. No.

The Presiding Judge: At what point was that, I am sorry?

The Defendant's Counsel: While observing the picture.

The Presiding Judge: Oh, did you discuss it with him?

The Witness: None, except I think I did ask him how much longer the film had to run, at one point, that was the point of our discussion.

Q. Was the film boring to Your Honor? A. Well, I don't know whether that weighed very heavily with me. The answer is for the most part, yes.

Q. Now, Your Honor, have you ever had occasion to see movies on 42nd Street? A. No. I have walked past them.

Q. Your Honor, how many motion pictures would you say you saw during the calendar year, January, 1969 through to the date that you saw this motion picture on [17] July 31?

The District Attorney: Your Honor, I would object to that.

The Presiding Judge: Sustained.

Q. Have you had special training, Your Honor, in motion picture techniques?

The District Attorney: Objection.

The Presiding Judge: Sustained.

Q. Your Honor, are you conversant with the United States Supreme Court decision in Roth versus the United States 354 U.S. 476? A. What was the item involved in the case?

The Presiding Judge: That is the case where a magazine operator by the name of Roth operated in Times Square, sent obscene material through the mail and convicted under the Federal obscenity statute. It is at the same time and the same occasion--

The Witness: Oh, I thought you said the Volt Case. The Roth case.

Q. R-O-T-H, yes. A. Yes.

Q. Are you conversant with the case of Redrup versus [18] New York which was decided by the United States Supreme Court in the latter portion of 1967?

The District Attorney: Your Honor, I object to this.

The Presiding Judge: What is the relevancy? Sustained.

Q. Your Honor, will you give us the definition of obscenity as you understand it?

The District Attorney: Objection.

The Presiding Judge: Sustained.

Q. There must be a criteria, Your Honor, by which you determined this film to be obscene. Will

you tell us what criteria that was? A. I already did. I stated that right in the beginning of my--

Judge Moldow: Justice Goldberg--

The Presiding Judge: The objection is sustained.

The Witness: Pardon me.

Q. Did you find the camera work in this picture to be offensive to you?

The District Attorney: Objection, Your Honor.

[19]The Presiding Judge: Sustained.

Q. Did you call anyone at the theatre prior to signing your ex-parte order? A. No.

The Defendant's Counsel: I have no further questions.

The Presiding Judge: Thank you. Thank you, Your Honor.

(Witness excused)

The District Attorney: The People now call Inspector Smyth to the stand.

Judge Moldow: Before Judge Goldberg is excused, I have this thought in mind, that is my understanding that we are going to view the film, that there is going to be a stipulation that the film we are going to see is the same one Judge Goldberg saw?

The Defendant's Counsel: Most assuredly.

Judge Moldow: Or do we require his presence here?

The Defendant's Counsel: Most assuredly I will stipulate.

[20] The District Attorney: Yes.

The Presiding Judge: All right.

Judge Moldow: Thank you.

(Witness again excused)

Court Officer Joseph Hughes: Raise your right hand and face the Judge. (Witness complies)

Judge Moldow: Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

The Witness: I do.

Judge Moldow: Please be seated.

Court Officer Joseph Hughes: Name, shield and assignment in a loud voice.

The Witness: Deputy Inspector Charles Smyth, First Division, New York City Police Department.

DEPUTY INSPECTOR CHARLES SMYTH, called as a witness on behalf of the People, assigned to the First Division, New York City Police Department, having been first duly sworn by Judge Moldow, testified under oath as follows:

Direct Examination by the District Attorney:

[21] Q. Inspector Smyth, during the month of July, 1969, did you have occasion to see a movie entitled A Blue Movie? A. I did.

Q. How many times did you see that movie? A. Twice.

Q. When was the first time you saw that movie? A. July 29th.

Q. Where did you see that movie at? A. In the Garrick Theatre, 152 Bleeker Street, New York City, which is in the Greenwich Village section.

Q. And, at that time, when you saw it on July 29th, what time did you see it? A. Approximately 3:40 to 5:20 p.m.

Q. And, did you see the movie by yourself that date? A. I did. No, I am sorry, I did not. Accompanying me were Inspector Rockwell of the Manhattan South, and Lieutenant Sullivan, also of Manhattan South.

Q. Did you have later occasion to see that movie, also? A. I did.

Q. When was that? [22] A. July 31st, approximately the same showing, 3:40 p.m. to 5:20 p.m.

Q. Did you see that movie by yourself or with somebody else? A. I saw that movie with Judge Goldberg.

Q. Officer, on each occasion that you saw this movie, about how many people were in the theatre? A. Approximately 100 on each occasion.

Q. And, if you recall, could you approximate roughly the seating capacity of the theatre? A. I would say about 200.

Q. Now, officer, on July--you testified that you saw the movie at a second time on what date? A. July 31st.

Q. Now, on July 31st, did you also make arrests that day? A. I did.

Q. Would you please relate to the court, the facts and circumstances leading to the arrests that you made on that day? A. At the conclusion of the performance--

Q. (interjecting) Officer, perhaps you should [23] start a little bit earlier at the beginning of the movie when you were accompanied-- A. (interjecting) I accompanied Judge Goldberg to the movie, at my request, well, at the request of the District Attorney, with myself, he and I viewed the showing of the Blue Movie from 3:40 to approximately 5:20 p.m. At the conclusion of the performance, Judge Goldberg and myself walked outside, I asked the Judge if he felt it was obscene.

The Defendant's Counsel: Objected to, Your Honor.

The Presiding Judge: Sustained.

A. (continued) I felt--

Q. What did the Judge do?

The Presiding Judge: Don't tell us your conversation.

A. The Judge then signed a search warrant.

The Presiding Judge: A search warrant?

The Witness: Yes, sir, it is also a search warrant giving us the right to search for the film and three arrest warrants, at the conclusion of which I took these warrants, went back into the theatre, [24] and placed under arrest the three persons, and acquired the film which was in the projection room.

Q. Now, pursuant to that search warrant, what material did you take from that theatre? A. Three reels of film.

Q. Is that the only property you took? A. That is the only property I took.

Q. Now-- A. (interjecting) There was, yes, excuse me, there was one poster which the manager said we might have, also, depicting--

The Defendant's Counsel: That is objected to.

The Presiding Judge: Sustained to what it depicts. Do you have the poster?

The Witness: I had in in my office. It is not in evidence, it was just the fact that Mr.--

The Presiding Judge: We will decide, Inspector, with due deference to your high rank what is evidence.

The Witness: All right.

[25] Q. All right, Inspector, pursuant to those arrest warrants, are any of the parties named or arrested that date here before us today? A. Yes, Mr. Heller is here.

Q. And what was Mr. Heller's capacity as indicated in the arrest warrant?

The Defendant's Counsel: It speaks for itself, Your Honor.

The Presiding Judge: Yes, it speaks for itself. Regardless of what the arrest warrant says, do you know what his connection with the film is or was?

The Witness: He was manager of the theatre.

Q. All right, Officer, could you please elaborate or relate the circumstances under which you took this film, where was the film located when you took this film? A. In the projection room. One of the reels was still in the projector, and two were laying next to it.

The Presiding Judge: Did you sign a complaint, sworn complaint in this case?

[26]The Witness: I did.

The Presiding Judge: When were the warrants issued, before or after you executed the complaint?

The Witness: The forms had been prepared--

The Presiding Judge: No, when were the warrants signed?

The Witness: After the completion of the film.

The Presiding Judge: Was it after you made out the complaint, signed the complaint and swore to it or before?

The Witness: The complaint--the warrants were prepared at the time I made the complaint.

The Presiding Judge: I didn't ask you whether they were prepared, Inspector.

Judge Moldow: We assume they were prepared before.

The Witness: Yes.

Judge Moldow: When were they executed, is the Judge's question.

The Witness: They were executed after the [27] film had been viewed.

The Presiding Judge: You also signed a sworn complaint?

The Witness: Yes.

The Presiding Judge: With relationship to the time when you signed that sworn complaint, when were the warrants executed?

The Witness: I don't follow.

Judge Moldow: Do you remember swearing to the complaint?

The Witness: Yes.

Judge Moldow: When did you do that?

The Witness: I swore to it on July 30.

Judge Moldow: That the day before?

The Witness: Yes, right.

The Presiding Judge: No, look at the paper, will you please, Inspector. Is that your complaint, Inspector?

The Witness: Yes.

The Presiding Judge: Did you swear to it and sign it?

The Witness: I did.

[28] The Presiding Judge: When, what date? Look at the original. Is there a date on there, that the date you swore to it?

The Witness: I am trying to find it. It was--no, the blue sheet isn't here, is it?

The Presiding Judge: Do you have any trouble finding the complaint?

The Witness: Yes, July--wait a minute, July 31st.

The Presiding Judge: Was that the date you saw the film with Judge Goldberg?

The Witness: That is.

The Presiding Judge: All right. Now, the warrants, wait, are you confused?

The Witness: I am confused on this. Just a minute, please, he said the blue sheet but--

Court Officer Joseph Hughes: That is the complaint.

Judge Tolleris: That the complaint?

The Witness: This is the complaint after the arrest was made. This is the complaint after the arrest was made, this is not the one for the warrant.

[29] The Presiding Judge: Inspector, will you kindly look at the complaint that bears your signature.

Judge Moldow: Don't concern yourself with the warrant.

The Witness: I am sorry, this is what I understood the judge to say.

The Presiding Judge: Will you kindly look at the complaint?

The Witness: The complaint was signed July 31.

The Presiding Judge: By you?

The Witness: By me.

The Presiding Judge: Do you remember Judge Goldberg signing warrants?

The Witness: I do.

The Presiding Judge: Arrest and search?

The Witness: I do.

The Presiding Judge: Were those warrants signed by Judge Goldberg before or after you signed that complaint?

The Witness: It was signed before I signed [30] this complaint.

The Presiding Judge: You mean Judge Goldberg signed warrants before you made a complaint in the case?

The Witness: This is the arrest complaint.

The Presiding Judge: I am not asking--forget it.

The Witness: You got me confused on--

The Presiding Judge: I don't see how you can--withdrawn. You made the complaint?

The Witness: I did.

The Presiding Judge: Judge Goldberg signed a search and arrest warrant based on your complaint, was it?

The Witness: Based on my application for a search warrant and arrest warrant.

The Presiding Judge: Well, that was--

The Witness: (interjecting) It is not in here, it is not in here.

Judge Tolleris: Did you sign a separate affidavit applying for an arrest and search warrant?

The Witness: Yes.

[31] Judge Tolleris: Prior to the time you signed that?

The Witness: Yes, this is a copy of it.

Judge Tolleris: In other words, you made your application based on ordinary affidavit, what you considered probable cause?

The Witness: Yes, that is right, of the application for the search warrant.

The Presiding Judge: Show it to the District Attorney.

The Witness: This is the confusing part.

The Presiding Judge: Is it your testimony, that based on your application for a search warrant, and before the judge looked at the picture, he signed the search warrant, is that your--

The Witness: (interjecting) No, it is not.

The Presiding Judge: That is what I am trying to find out.

The Witness: I made application for the search warrant.

The Presiding Judge: I don't care what you made an application for or when you made it. [32] I am trying to find out when the Judge signed the search warrant.

The Witness: After viewing the film.

The Presiding Judge: And was that after you made--since your written complaint here?

The Witness: If you mean the blue complaint after the arrest, it was before, this blue complaint was drawn up that evening after the arrests had been consummated. This is the blue form which was drawn up after the arrests had been consummated.

Judge Moldow: Will you tell me and see if I understand it, you and Judge Goldberg saw the film?

The Witness: Yes.

Judge Moldow: And after you saw the film, you presented him with an application for search and arrest warrants based on a supporting affidavit?

The Witness: Correct.

The Presiding Judge: He signed the search and arrest warrants and you executed those warrants by arresting some people and seizing some film?

The Witness: Correct.

Judge Moldow: Thereafter, during the course [33] of the same day, you signed a full complaint and affidavit in this case?

The Witness: I did, that's right, that is what I am trying to explain, and that blue sheet was signed after the arrest was consummated.

The Presiding Judge: And warrants were signed by Judge Goldberg after he had seen the picture?

The Witness: Correct.

The Presiding Judge: All right. Thank you.

Q. All right, Officer, when you walked into the projection room, how many reels were in the projector? A. One reel was in the projector.

Q. And how many reels were in the projector room? A. Three.

Q. Were there any other films there? A. No other films that I viewed. I looked in the area, and there were no other films.

Q. When you took these three reels, what did you then do with the three reels? A. I spoke with the projectionist.

Q. Just tell the court what you did with the three [34] reels. A. I took the three reels and had them sent to the property clerk's office.

The Presiding Judge: You had them sent or you brought them there?

The Witness: I had them vouchered in the precinct, received the voucher number there, then under the care of the precinct forwarded it to the property clerk's office.

Q. And at what point did you pick these up from the property clerk's office? A. As I recall, it was August 26th.

Q. And, have you had them in your possession since August 26th? A. I did.

Q. Where did you have them in your possession? A. I had them in my locker with my private lock on it, only I know the combination of it.

Q. Do you have those films here with you today? A. I do.

Q. All three reels? A. All three reels. Do you want to open that?

[35] The District Attorney: Yes. The officer is now opening a plastic container. Any question about these being--

The Defendant's Counsel: No question. We stipulate.

The Presiding Judge: All right, stipulated and offered as People's 1 of a movie entitled Blue something, Blue Movie.

The District Attorney: Property clerk voucher 69M24592. People's 1 in evidence deemed marked People's 1 in evidence.

(Whereupon plastic container with three reels of movie film was deemed marked People's exhibit 1 in evidence.)

The District Attorney: The People have no other questions of the Inspector at this time, and we are prepared to present the movie to the Court.

The Presiding Judge: All right.

Cross-Examination by the Defendant's Counsel:

Q. Deputy Commissioner (sic) Smyth--

[36] Judge Moldow: Deputy Inspector. Now you promoted him.

The Defendant's Counsel: I am sorry.

Q. (continuing) Deputy Inspector Smyth, when you first saw the movie on July 29th, who went to the theatre with you on that date? A. I just stated Inspector Rockwell and Lieutenant Sullivan.

Q. When you went to the movie that day, did you pay an admission fee? A. I certainly did.

Q. Did you notice signs in the lobby when you walked into the theatre with regard to age? A. I don't recall seeing any such sign.

Q. Now, on July 31st, you came back to the theatre again? A. I did.

Q. And you paid another admission fee? A. Right.

Q. And did you see any other sign there with regard to age on that day? A. I do not recall seeing any such sign.

[37] Q. Now, on July 31st, at 5:30 in the evening, Judge Goldberg, or thereabouts, signed a search warrant and arrest warrant, correct? A. Correct.

Q. Now, you had papers which you submitted to Judge Goldberg for signature prior to his signing of those documents, is that accurate? A. It was the application for such--

Q. (interjecting) Where did you sign that paper? A. In his--at his presence.

Q. At 5:30 that evening, correct? A. Right.

Q. Okay, and the formal complaint in this matter was drawn subsequent to seven o'clock that evening, is that correct? A. Subsequent to the arrest.

Q. Right, and at about six o'clock that evening, did you see me at the Garrick Theatre? A. You came there, that's correct.

Q. Did I point out to you that the seating capacity, there was a big sign there, had 299 seats, if you recollect? [38] A. I don't recall you pointing out any such sign. Originally you stated you were the manager.

The Presiding Judge: You said what?

The Witness: I do not recall.

The Presiding Judge: Originally you said what?

The Witness: Originally I asked for the manager and he said that is me, and when I said I had the John Doe warrant, he said he was only the lawyer, Mr. Heller was the manager.

Q. Did you see any sign there on that day which indicated right above the ticket taker's booth, indicating that you had to be over the age of 17 to get into the theatre?

The District Attorney: Objection. The question was asked and answered.

The Presiding Judge: Overruled. He is not bound by it.

A. I do not recall seeing any such sign.

Q. Now, did Mr. Heller arrive there that night? A. He did.

Q. Was he the one who had a key to let you into a [39] room there that night, do you recollect that? A. He did.

Q. This was the manager's room? A. Correct.

Q. Did you look through the room that night? A. With his permission, we did.

Q. Okay. Now, are you aware of the type of motion picture films shown in and around the City of New York?

The District Attorney: Objection.

The Presiding Judge: Well, he can say yes or no.

A. I am aware of certain types.

The Presiding Judge: The answer is yes or no, Inspector.

A. (continuing) Yes.

Q. Are you aware of the dramatic change in social climate with regard to the depiction of sex on the screen?

The District Attorney: Objection.

The Presiding Judge: Sustained.

The Defendant's Counsel: Your Honor, I think at this point I have to state the following. [40] I have been curtailed in my cross-examination and I think one of the es-

sential elements in proving obscenity as defined in Your Honor's own case, that it must be patently offensive because it affronts contemporary community standards as enunciated in the three cases that the Supreme Court has set down. It is impossible for me--

Judge Moldow: Aren't you the last one to want this man, this witness, to set those standards?

The Defendant's Counsel: I may want him to set the standards because I don't think he knows them.

Judge Moldow: We are not going to let him set the standards. I think I speak for my brother judges.

The Presiding Judge: Yes. I might point out to you, Counselor, that there is a wide diversity of opinion throughout the country, including the federal courts, on this very issue. Now, there are some cases that have held that it is part of the People's case to establish what the so-called [41] community standards are. There are other cases which hold that that is not a part of the People's case. There are some cases that hold that expert testimony as to what community standards are, should be introduced. There are other cases that hold to the contrary.

The Defendant's Counsel: Agreed, Your Honor.

The Presiding Judge: And even Redrup, which you cite as a leading case, the judges split four different ways, they couldn't agree on an opinion, all they could agree was that

the case should be reversed. All right.

Q. Have you had any special training in the theatre, as to theatre background?

The Presiding Judge: You mean as active producer, manager?

Q. (continuing) As a theatre critic? A. No.

Q. Do you have any journalistic background with regard to theatre? A. No.

[42] Q. Now, did you have any talks with Judge Goldberg while you were at the theatre that day with regard to the signing of the search warrant, and prior to his signing the search warrants? A. Will you clarify that a little bit more?

Judge Moldow: I would appreciate that, too.

Q. During the course of the movie, did you speak to Judge Goldberg? A. Yes.

Q. What did you ask him about? A. He asked me if it was much longer.

Q. Did you find the movie boring? A. Absolutely.

Q. Did you find it repetitious? A. Well, yes, I would say--what do you mean by repetitious, the acts or the conversation?

Q. The conversation. A. I found the entire thing boring, repetitious, if you wish.

Q. Have you seen any Andy Warhol films before?

The District Attorney: Objection.

The Presiding Judge: We will allow him to say yes or no.

[43] A. No, not to my recollection. I might have seen them and not known it.

Q. Did this movie arouse you to go out and find a woman and go to bed with her?

The District Attorney: Objection.

The Presiding Judge: Sustained.

The Defendant's Counsel: No further questions, Your Honor.

The Presiding Judge: All right, thank you, Inspector.

(Witness excused.)

The Presiding Judge: Anything else?

The District Attorney: At this time the curtain will rise on the movie.

The Presiding Judge: All right, we will look at it. Counsel, please. (Discussion off the record.)

(Whereupon recess was taken while attorney in another matter made an application).

(Whereupon interested parties retired to chambers where film was viewed and following remarks were made during filming.)

[44]The Presiding Judge: Shall we get a couple of yellow pads for the Bench, please? All right, go ahead, run it. (Film runs). Do you have sound on it? We have no sound as you all observed. (Film runs again). For the record, what are these people saying, none of the judges can hear? Is there anything wrong with the machine or is that the way it is going to be projected? Is that the way it is going to go? (Film runs). Because we find it extremely difficult to understand most of the words being said.

The District Attorney: There will be testimony, Your Honor.

The Presiding Judge: All right, go ahead. Sorry. (Film runs) The sound is much clearer now. (Film runs). At this point the sound is dead. (Film runs). Although we can observe the actors are talking to each other. (Film runs.) All right, we will take a recess.

(Recess taken while second reel was being readied.)

[45] (Second reel of film was shown and a recess was taken to be resumed after luncheon.)

(Court convened again in Chambers after luncheon recess.)

The Presiding Judge: All right, the District Attorney and Counsel are present. Let's go. We will now have the third reel.

Judge Tolleris: Lights.

Judge Moldow: Would you adjust the focus on that, please? That is better.

(Film runs.)

Judge Moldow: It is still out of focus.

(Film runs to end of reel.)

(Court reconvened in courtroom.)

The Presiding Judge: After the picture was shown, we are still on the People's case.

Mr. Beckler, we have viewed the film, and the case is still with you, Mr. D.A.

The District Attorney: Yes, Your Honor. The People will now rest their case.

The Presiding Judge: All right.

The Defendant's Counsel: Your Honor, at [46] this time I would like to make some motions with regard to the case.

The Presiding Judge: Proceed.

The Defendant's Counsel: At this time, Your Honor, the defendant moves to dismiss on the ground that the People have failed to make out a prima facie case, and the motion is a hydra-headed one, premised upon the Roth, the Redrup case, and the later case involving Stanley versus Georgia, all of which cases--

The Presiding Judge: Stanley versus--

The Defendant's Counsel: Stanley versus Georgia.

The Presiding Judge: Oh.

The Defendant's Counsel: As I understand the law in the State of New York--

The Presiding Judge: That is the one that Judge Marshal wrote the opinion on?

The Defendant's Counsel: That is correct, Your Honor.

The Presiding Judge: On viewing pictures--

The Defendant's Counsel: In the home.

[47] The Presiding Judge: (continuing) In the home.

The Defendant's Counsel: Yes, as I understand the law, Your Honor, and after having read Your Honor's opinion in People versus Stabile, the law in the State of New York is the same as the Federal law, to wit, that it is incumbent in order to define obscenity within the purview of either the Federal law or the State law that all three elements enunciated in the law and Redrup must coalesce, firstly, that the dominant theme of the material taken as a whole must appear to prurient interests in sex, that the film must be patently offensive because it affronts in this particular case contemporary community standards in its description and representations of sexual matter, and that it is utterly without redeeming social value.

The sole testimony that is adduced before this court here today, hasn't had one iota of testimony from any witness as to any one of those elements.

Therefore, on that basis alone, the filming [48] of the picture, per se, is insufficient, as a matter of law, predicated upon the determination of the United States Supreme Court to hold obscenity without some connection. We have no connection from any of the witnesses to show that. That is the first argument.

The second argument, there has been no prior adversary determination. Now, although the courts in this country have not had a United States Supreme Court ruling on whether or not a prior adversary determination must be had, in an obscenity case, there is a case in Virginia which was just recently granted certiorari to the United States Supreme Court on that very issue. In addition--

The Presiding Judge: What case is that?

The Defendant's Counsel: It is a Virginia case.

The Presiding Judge: The Lee Art Theatre, Virginia.

The Defendant's Counsel: Just was granted certiorari to the United States Supreme Court.

[49]The Presiding Judge: Isn't that a United States Supreme Court case?

The Defendant's Counsel: No, that was--

The Presiding Judge: I think so.

The Defendant's Counsel: Well, I will get hold of that case.

The Presiding Judge: Well, I will get hold of that case.

The Presiding Judge: Well, I have the notes downstairs in my chambers, and I am reasonably certain that this was a United States Supreme Court citation.

The Defendant's Counsel: Not on that issue, Your Honor.

The Presiding Judge: Well, I don't know what the issue is but wasn't Lee Art Theatre

the case where a search warrant was granted to a local sheriff by a police justice?

The Defendant's Counsel: Right.

The Presiding Judge: (continuing) In which the supporting affidavit stated the sheriff's observation of the film, and that he concluded that it was obscene without the justice of the peace himself or any other judicial officier viewing the [50] film, issued the warrant, and the United States Supreme Court in that case, said that the warrant was not based on any judicial determination of obscenity, that there was nothing in the supporting affidavit to show the basis on which the conclusion of obscenity was reached by the police officer, and on which the justice of the peace could act, and therefore they say that it violated the safeguards of the first and 14th amendments, and they strongly hinted, at least as I read the case, that the proper procedure at the minimum would have been for some judicial, prior judicial scrutiny. That is the Lee Art Theatre versus Virginia and it was a United States Supreme Court decision last year.

The Defendant's Counsel: Now, may I say--

The Presiding Judge: Maybe you have another case but that is the Lee Art case that I just recited to you.

The Defendant's Counsel: Well, on a diminution basis then, assuming arguendo that in fact the Supreme Court said that you have to have a judicial determination or judicial scrutiny--

[51]The Presiding Judge: But they didn't say that.

The Defendant's Counsel: In this case we don't have any supporting affidavits in this courtroom as of now, the predicates of which the search warrant and the arrest warrants were based. The testimony elicited from Deputy Inspector or Commissioner Smyth was to the effect that he signed a complaint subsequent to the search warrant.

There is nothing in the evidence here today that I have seen, which would indicate some basis for Judge Goldberg going to the theatre other than a verbal communication, and making an ad hoc determination much the same as any law enforcement agency, and in effect Judge Goldberg is in the same position as a police officer making a censorship situation, he went in and so stays. They do have statutes which permitted a judge to go in and view a film, where a police officer has come in, written up a whole report on the film, and set forth what he found to be unconventional sex, conventional sex where it was obscene, etc. We don't even have that [52] in this case, but I maintain, even if you did have that, that still would be violative of the Constitution because you must have a prior adversary determination to buttress that argument.

I hand to the Court a decision of Judge Zirpoli which came down from the Ninth Circuit, California, Nineteenth District on August 29th, which says, however horrid, the

same as in the I Am Curious case, whatever the picture may say, the rights of the defendant are paramount.

The Presiding Judge: How about the decision of Judge McLean in 208 Cinema versus Vargari, the Southern District of New York, and Judge--

The Defendant's Counsel: In Judge McLean's decision in the 208 case, he set forth that he was not following two determinations of two other United States District Court judges on the same level as he, but in that case, if you read the supporting papers, a policeman on long affidavits had a judge view the films, and he said in his opinion, based upon these papers, the judge had a right to view the films, look at the films, [53] and make this determination, also he was not going to be bound by his colleagues on the same line.

I happen to be quite familiar with that case, Your Honor, and I do know that the difference between that one and this one, at best, we have nothing before this Court except a determination by an individual, which is the Judge here, signing the complaint without any supporting papers.

I say that is clearly violative of any rule that any court has ever set down in the United States.

Judge Moldow: In other words, you say that while the determination made by a judge, but you would qualify it as a non-judicial determination?

The Defendant's Counsel: I would--

Judge Moldow: Because of an absence of an adversary proceeding?

The Defendant's Counsel: That is correct, and I would say it is confiscatory in nature, also, because what the judge has done in this case, and it could be anyone, not Judge-- whoever made this [54] determination just happens to be Judge Goldberg.

The Presiding Judge: No, that isn't quite a fair statement.

The Defendant's Counsel: Right.

The Presiding Judge: The determination was made by a judicial officer.

The Defendant's Counsel: That is accurate.

The Presiding Judge: That is something different than saying it happened to be a person who accidently happened to be a judge.

The Defendant's Counsel: Right. Well, I beg--

The Presiding Judge: We are making the distinction, I believe, and under the cases that a judicial officer is more competent say the various federal decisions to make a decision of obscenity than the ordinary layman, and that the question of obscenity or whether a publication is protected by the First Amendment, is a question of law for a judge or a court to decide. That is what I Am Curious Yellow is, so all right, go ahead.

The Defendant's Counsel: Now, in Judge Goldberg making this decision, and I don't

throw [55] this in as a twist, but it came out as a result of the testimony, in effect what he has done, and this may be slightly tangential, is to look at a picture, and the picture is the best evidence, allegedly, self-incrimination on the picture, decide on his own without having anyone else present to defend the picture.

Now, I would only bring that up, Your Honor, based upon the fact that in this particular case, they could have written out a protracted set of facts containing what was wrong with this picture, if anything. Deputy Inspector Smyth had two full days, which he testified to here, between the 29th and 31st, to sit down and write out a formal complaint, take the complaint, or take the affidavit to a judge, show him that affidavit, and not done what was shooting at the hip in this particular case; at 5:25 in the afternoon, he submitted an affidavit, and at 5:25 on that very afternoon, a search warrant was signed, and arrest warrant is signed, the picture is seized, nobody is brought down to even defend the position of the picture, [56] and that is the end of it.

In my opinion, Your Honor, and I only say this, there has not been a scintilla of evidence adduced by the People, which would warrant this case going to the defendants coming forward with evidence.

The Presiding Judge: Yes, Mr. Beckler?

The District Attorney: Yes. I will just speak briefly.

Your Honor, first of all, on the defense's first element that this, that the People have not presented any evidence as to the three tests of obscenity, I think the cases will hold that the actual presentation of the material itself, in this case the movie, The Blue Movie, being viewed by the judges of the court, is enough for the People's case.

It is unnecessary for the People to present representatives of the community to define community standards, nor is it necessary for the People to present expert witnesses testifying as to whether or not this movie is or is not appealing to the [57] Prurient interests, or whether or not it is patently offensive to the social community standards.

I believe that our burden here in presenting the case is sustained merely by the showing of this film to the Court.

On defense counsel's second point, I think that although there is a dramatic presentation here of a police office witnessing the movie, then waiting two days before he presents an affidavit to a judge, I think the fact was brought out quite clearly that this affidavit was presented to the judge, who read it and the judge then signed the search warrants and arrest warrants, based on the affidavit produced by Deputy Inspector Smyth.

Furthermore, I think the Rage book case makes it quite clear that this court, a higher court than this court in this district, namely the Southern District Federal Court has held that there is no necessity for a prior adver-

sary determination of obscenity, when the District Attorney offers, or the police move to emphasize the State's obscenity laws.

[58]The Presiding Judge: Well, of course there are cases, and the Kingsley Books versus Brown, the United States Supreme Court said we are not going to in effect tell the State what remedy in the armory of the law they are to choose to persecute the defendant. They may do it by an adversary proceeding or by criminal prosecution.

I don't think that has been disturbed as yet. Now, I want to ask one other question of Counsel.

When you talk about an adversary proceeding, are you referring to the proceeding under 22a of the Code?

The Defendant's Counsel: No.

The Presiding Judge: Well, how else would you have it?

The Defendant's Counsel: I am talking about a proceeding where it might be -- the adversary proceeding done under 22a of the Code, it could be in an informal conference, it could be under any set of circumstances but there must be--

The Presiding Judge: Well, you are only [59] having judicial hearings or you can label them conferences in accordance with the terms of the existing statutes.

The Defendant's Counsel: Well, let me say this, Your Honor, built into the federal statute which we do not have in the statute, is the following. There is a proceeding

where a man brings in a film from export, from overseas, the Customs Department seizes the film. They must give notice to the defendant, the defendant then has a right within five days to institute a proceeding, and you have built--

The Presiding Judge: Yes, a judicial proceeding to determine it.

The Defendant's Counsel: Right.

The Presiding Judge: Now, the only proceeding that I am acquainted with is Section 22a of the Code of Criminal Procedure. Do you know of any other proceedings under which it could be held?

The Defendant's Counsel: No, I don't.

Judge Moldow: And the federal statute is [60] predicated on the fact that there is an immediate seizure without any kind of judicial review.

The Defendant's Counsel: Not entirely accurate, Your Honor.

The Presiding Judge: Well, if I may?

The Defendant's Counsel: Sure.

The Presiding Judge: I do not want to get into semantics here, but the seizure by customs is not technically a seizure under the law, it is merely a detention by customs, and the film is not seized until after a judicial determination as to its obscenity.

Judge Moldow: In the meantime, nobody is seeing the picture.

The Presiding Judge: No one has seen it, but let me go a step further.

If you read 22a of the Code, 22a refers

to tangible objects, immutable objects, or practically immutable like books, magazines, the printed word.

The Defendant's Counsel: Right.

The Presiding Judge: Devices, objects.

[61] The Defendant's Counsel: Yes.

The Presiding Judge: Nowhere in 22a will you see any reference to theatrical productions or motion pictures. Now, that is not an accident.

As a matter of fact, in 1966, there was introduced into the state legislature two bills to amend 22a, to include motion pictures, and both bills died in committee. Now, this to me, means that the legislature advisedly or ill-advisedly, but nevertheless deliberately left out motion pictures under that code, under that code provision, and the reason is good, it is simple, may not be good but it is completely understandable, and if you read the 208 Cinema against Vergari up in the Southern District, you can understand the reasoning behind it. How do you seize a motion picture? Now you have got a picture showing in your theatre, how do the police seize it?

The Defendant's Counsel: How do they seize it in 208, Your Honor?

The Presiding Judge: By a warrant.

The Defendant's Counsel: Based upon what? Based upon a protracted affidavit setting--

[62]The Presiding Judge: No, whatever it was, there was an affidavit of support, in

support of a warrant, and a viewing by the judge, and then the search warrant was issued. Now, this is essentially what was done here. Now you want a protracted affidavit?

The Defendant's Counsel: I don't see the affidavit here.

The Presiding Judge: Wait a minute, you never attacked the warrant unless now—

The Defendant's Counsel: I don't believe I have to attack the warrant.

The Presiding Judge: Well, that is a moot question now, I won't debate that with you now but there is no way of knowing that the motion picture film that is seized has not been tampered with by the time it gets to the Court for a judicial determination of obscenity, and I call your attention to an article a few Sundays ago in the Sunday Times by Victor Canby, quote, the title is, Which Version Did You See?, referring to the motion picture The Wild Bunch, in which the eight minutes of the original [63] film were lifted right out of the film that was displayed.

Now, it is easy to edit, to cut, to take stuff out of motion pictures so that there is no assurance that the film, to follow your idea of how this should be handled, there is no assurance that the film that the police or the public saw originally is the same film or would be the same film that the judge would see in an adversary proceeding, and I ask how do you seize a film other than by a search warrant?

Now, the purpose of all of this legislation has been to protect the First Amendment, a right to freedom of speech, and that is being done by this Court and this case, at least I am not prejudging what we are going to do with this thing, I haven't discussed it with my colleagues as yet, but it seems to me as Judge McLean in the Vergari case, 208--

The Defendant's Counsel: 208 Cinema.

The Presiding Judge: (continuing) 208 Cinema versus Vergari, that what more can you do than to have the officer make an affidavit, and the [64] police, the judge go in and look at the picture, what more can be done, and search; there is no provision in my view, I don't know if my colleagues will agree with me, we haven't discussed it yet, but in my view there is absolutely no provision for the seizure to an adversary proceeding under 22a in the Code of Criminal Procedure, either as to motion pictures or as to theatrical productions.

The Defendant's Counsel: Well, Your Honor, I can only say this, I am conversant with the 208 Cinema case, I am not in accord with Judge McLean's determination in the case.

It is logical, most of the United States district courts throughout the country have held contrary to Judge McLean, or Judge McLean had something before him which is not before this three man bench, and that is the following, he had a substantial af-

fidavit, not the testimony of a police officer who hasn't even exhibited in the courtroom as of now as to what his affidavit was; on that basis Judge McLean might have had the right to rely upon the affidavit, and the judge [65] seeing the picture. We certainly don't have that here today, and my argument, therefore, is, Your Honor, assuming Judge McLean is right and 22a doesn't have the requirements for an adversary determination, the People have failed to prove their case by not doing acts that they had time to do.

The District Attorney: Your Honor, may I speak?

The Presiding Judge: Well, I just want to say one thing. It seems to me, and I am not going to talk for both my colleagues, that if you are talking about the warrant and the seizure, your remedy would be motion to controvert the warrant.

Judge Tolleris: I agree.

Judge Moldow: The Judge saw the picture in question. Isn't he in a much stronger position than relying on any affidavit of somebody else's observation? I think he did everything that he could have done.

The Presiding Judge: All right.

The Defendant's Counsel: One last question. [66] My last point on the argument is this, that the statute is unconstitutional, because not built into the statute itself--

The Presiding Judge: You mean 235.05?

The Defendant's Counsel: Yes, 235.05

of the Penal Law is unconstitutional, because not built into the statute itself, coupled with Your Honor's observation of 22a, there is no effective modus operandi procedurally for a speedy trial, despite the provision of the Code of Criminal Procedure which says you must get a speedy trial under some other section. It must be built into the section itself, Freedman against Maryland.

The Presiding Judge: Yes, that is a well known case.

The Defendant's Counsel: Right.

The Presiding Judge: All right, we will consider the motion to dismiss at the end of the People's case.

(Court confers.)

The Presiding Judge: Motion is denied.

The District Attorney: At this time, the [67] People would move to dismiss any other defense witnesses.

The Presiding Judge: All right.

The Defendant's Counsel: I have only four witnesses.

The Presiding Judge: Are they expert witnesses?

The Defendant's Counsel: Three of them. Do you want them excluded?

The District Attorney: Yes, I do.

The Presiding Judge: All right, all witnesses except the one called to the stand to testify outside. All right, call your first witness, please.

Court Officer Joseph Hughes: Take the stand.

Judge Moldow: Raise your right hand.
(Witness complies.)
Judge Moldow: Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?
The Witness: I do.
[68]The District Attorney: Your Honor, have the witnesses been excluded?
The Presiding Judge: I have directed that all witnesses on both sides, except the witness on the stand, will kindly step outside until called. That goes for the police and everybody else. All of the other witnesses as well.
Court Officer Joseph Hughes: Give your name, address and occupation, keep your voice up so the judges can hear you.

The Witness: Parker Tyler. I live at 15 Charles Street, New York. I am a writer by profession.

PARKER TYLER, witness called on behalf of the defendant, residing at 15 Charles Street, New York, New York, occupation writer, having been first duly sworn by Judge Moldow, testified under oath as follows:

Direct Examination by the Defendant's Counsel:

Q. Now, Mr. Tyler? A. Correct.

Q. Will you tell us what you do for a living? A. I write books, mainly.

Q. And what do you write books about? A. About motion pictures and painting.

Q. And, for how many years have you written books about motion pictures? A. My first book was published in 1944.

Q. What was the name of that book? A. The Hollywood Hallucination.

Q. And, since 1944, will you tell the Court what books you have written with regard to film? A. I have written altogether six. The second was Magic and Myth of the Movies, the third was a Biographic Study of the Chaplin Myth. The fourth was Classics of the Foreign Film, the fifth was a collection of magazine pieces, Three Phases of Film, and one published just this month is called, Sex Psyche, et cetera In The Film.

Judge Moldow: What was the title again?
The Witness: Sex Psyche et cetera In The Film.

Q. Mr. Tyler, have you ever been to a film seminar? A. Oh, yes.

Q. Will you tell us what seminars you have been to?

[70] The Presiding Judge: What is a film seminar?

Q. Will you tell the Judge what a film seminar is? A. I assume he is talking about--

The Presiding Judge: If you don't understand, Mr. Tyler, what he is talking about, we will have him reframe the question.

A. (continuing) I am assuming he is talking about something like the New York Film Festival.

The Presiding Judge: I don't know what he is talking about. He has asked if you have ever been to a film seminar, and for our edification we would like to know, first, what a film seminar is.

The Defendant's Counsel: I will withdraw the question.

The Presiding Judge: If you know what it is.

The Defendant's Counsel: I will withdraw the question and reframe it, Your Honor.

The Presiding Judge: Thank you.

Q. Have you ever attended a film festival?

The Presiding Judge: A film festival?

The Defendant's Counsel: Yes, film festival.

[71]The Presiding Judge: Yes, all right.

A. Yes, I have.

Q. Will you tell us what film festivals you have attended? A. Well, for the last four years, the New York Film Festival where in the special events program, there were lectures and programs in which I participated.

Q. And, did you do any lecturing at any colleges and universities? A. Yes. I lectured at--

Q. (interjecting) Will you tell us what colleges and universities you lectured at with regard to film? A. Columbia University.

Q. When, if you remember? A. That was in the late 40's.

Q. Thereafter? A. At the New School Social Research, at Cooper Union, and various colleges, at Trinity College in Hartford, and not long ago in Albright College, Pennsylvania.

Judge Moldow: Are you paid for these lectures?

The Witness: Yes. Not in every case. Cooper [72] Union is a free school so I am not paid for that.

Q. How many motion pictures do you see during the course of the year? A. Well, I should say about a hundred, at least.

Q. Do you write any articles for any journals? A. Every now and then I do. Lately I have been devoting myself to books. I still write for magazines.

Q. Will you tell us what magazines you have written for? A. Well, in the past I have written for a number of academic magazines, the Kenyon Review which used to be published by Kenyon

College, the American Quarterly published by the University of Pennsylvania, and I have been published by the New Republic, and the Nation.

Q. And all of these articles dealt with films, is that correct? A. Yes.

Q. Now, Mr. Tyler, when was the first time you met me? A. Today.

Q. Mr. Tyler, are you being paid for testifying here today? [73]A. No.

Q. Mr. Tyler, did you see a motion picture, Andy Warhol's Blue Movie? A. Yes.

Q. When did you see that motion picture? A. Oh, I saw it at a private screening about a year ago, I think.

Q. Now, Mr. Tyler, you stated you have a book which came out this month. What is the name of that book? A. Sex Psyche et cetera In the Film.

Q. Now, did you write a chapter in that book, devoting that chapter to this movie? A. Yes.

Q. Mr. Tyler, in seeing Andy Warhol's movie, Blue Movie, did you find any social value in the film?

Judge Moldow: Before we get into that, Counsel, I will tell you something that disturbs me. We viewed a film, during the course of today, that was very badly edited

in many spots, and I don't think you have to be an expert to see that. This witness has been asked questions about a movie that he saw about a year ago. Aside from the fact that you [74] have identified it by the title, what kind of assurance of any kind do we have that the contents approximated what we saw today? Do you intend to establish that in any manner?

The Defendant's Counsel: I can't. I think it is almost impossible for me to--

The Presiding Judge: That is a problem in these cases that my colleague indicated a little earlier with the affidavit situation. The judge relies on an affidavit, he doesn't know whether that same movie is going to be seized according to the terms of his warrant. Now you are in a similar posture, offering evidence. All we know is he saw something called Blue Movie, and to identify it foot by foot with what we saw today is, I appreciate, an overpowering task, isn't it?

The Defendant's Counsel: I think it is, but I think, Your Honor, if we take the position that we have never refuted the contents of the film that you saw here today, particularly the one act, and this witness is not going to refute that, I don't think there is any unconventional sex in the [75] film, and I don't think there is any problem in dealing with this witness' having seen the film that Your Honor saw this morning.

Judge Moldow: I suppose it will probably go to the weight of his testimony rather than the admissibility, anyhow.

The Presiding Judge: Yes, all right.

The Defendant's Counsel: What was the last question?

The Presiding Judge: Did you devote an entire chapter of your last book, Sex Psyche et cetera In The Film to Blue Movie, this picture, and you saw it a year ago. Go ahead. I think that was it.

Q. Yes, will you answer the question? A. Yes, I did devote a chapter to it.

Q. All right, did you see any social value in the film? A. Yes, I saw a particular social value. I think it represents what might be called the attitude of the cool world toward sex.

The Presiding Judge: The attitude of what world?

[76]The Witness: The cool world.

The Presiding Judge: Cool, C-O-O-L?

The Witness: Yes, that's right.

The Presiding Judge: What is the cool world, if I may--

The Defendant's Counsel: (interjecting) That might be Swoboda hitting a home run last night, I don't know.

The Presiding Judge: You mean Swoboda didn't know he hit a home run?

The Defendant's Counsel: Yes, he did. I would be willing to expand on it.

The Presiding Judge: Well, if there is any objection to the question I will withdraw it, but when he uses a term, I think

it would be helpful to the Court if we explained, if the witness explained, or somebody explained what he meant by that term.

Q. All right, what do you mean, Mr. Tyler, by the word cool world, the words? A. I mean an attitude that has grown up in modern times, along sophisticated groups, among youth groups. It is an attitude of detachment, of indifference to the emotions, [77] of taking everything in a perfectly cool way. I think that is the way sex is taken in the film in question. Sex is not represented as anything very exciting or extraordinary. It is an ordinary common event, and it is mixed in with conversation, gossip, it is no more than a diversion, a distraction.

The Presiding Judge: Just like eating the hamburger in the picture?
The Witness: Yes.

Q. Now, have you seen any other Andy Warhol pictures prior to viewing this film? A. Oh, yes.

Q. And, did you notice the same type of camera technique employed in this film as in the other Andy Warhol films? A. Oh, yes. It is always likely unedited footage, strung together, rather informally, and independent in the subject matter but not in camera technique to aesthetic values.

Q. Will you explain what you mean by camera technique and aesthetic values? A. When a film is made to be interesting, all kinds [78] of shots,

close-ups and medium shots, and so on, for variety's sake, different angles of the same action, but Warhol's camera is nearly always staring deliberately passive, doesn't try to articulate anything on its own, the actors articulate everything.

Q. Did you find this film sexually stimulating? A. No, not at all.

Q. Did you find this film lewd? A. Not according to my notion.

The Presiding Judge: I didn't get that.

The Witness: Not according to my notion of lewd.

Q. Did you find this film lascivious? A. No.

Q. Did you find this film salacious? A. No.

The Defendant's Counsel: No further questions.

Judge Moldow: Have you seen films of that nature?

The Witness: Yes, not any blue movies, not the films that are manufactured purely for pornographic viewers.

[79] Judge Moldow: What do you mean by the expression blue movies?

The Witness: Well, it is supposed to be a film made, I guess, for stag purposes, merely for the sake of showing the sexual acts so as to excite lewd feelings; these are all sub rosa.

Judge Moldow: So the term blue movie has a special meaning in the motion picture industry?

The Witness: Yes, it is common parlance.

The Defendant's Counsel: But you did not find this to be a blue movie, is that true?

Judge Moldow: Yes, he testified.

The Witness: Yes, it was advertised that way. That was not the original title.

The Presiding Judge: Who advertised it that way?

The Witness: The newspapers at times, and the Village Voice.

The Presiding Judge: What do you mean, they paid for the ads?

The Witness: No, no, I mean the title was represented in the ads as Blue Movie.

[80] The Presiding Judge: And you say the term, Blue Movie, this was synonymous with what we used to call in our youth, stag movies?

The Witness: In common parlance, yes. Yes, I am talking about common parlance, yes.

The Presiding Judge: Yes.

Judge Moldow: Do you know what the title of this picture was before it was renamed Blue Movie?

The Witness: Yes.

Judge Moldow: What was it?

The Witness: Fuck.

The Presiding Judge: What?

The Witness: Fuck.

The Presiding Judge: F-U-C-K-?
The Witness: That's right.
The Presiding Judge: The Anglo-Saxon--
The Witness: (interjecting) That's right.
The Presiding Judge: All right. One more question, Mr. D.A., if you do not mind. What is your age, Mr. Tyler?
The Witness: Sixty-five.
The Presiding Judge: Sixty-five?
[81] The Witness: That's right.
The Presiding Judge: Thank you.

Cross Examination by the District Attorney:

Q. Mr. Tyler, you testified that you started writing books about the theatre in 1944, is that correct? A. Yes, that is the date of my first book. I did a few articles before that.

Q. Your first book was published in 1944? A. Yes, that's right.

Q. Could you please relate to the Court what your formal education was? A. My formal education?

Q. Yes. A. I left Chicago Latin College in my sophomore year in order to write.

Q. This is a high school, Chicago Latin College? A. A college preparatory school.

Q. So your formal schooling ended at the age of 16, approximately? A. Technically speaking, yes.

Q. Did you ever, at any time after that, take [82] any courses in film making or film editing or photography? A. Oh, no, indeed.

The Presiding Judge: Or film criticism?

The Witness: Oh, no, no.

Q. When is the last time you had an article published in a journal? A. I can't remember the last time.

Q. Well, approximately? A. Oh, a year or so ago.

Q. Mr. Tyler, have you ever testified before a trial as to socially redeeming value? A. No.

Q. What does socially redeeming value mean to you? A. I should say the content in a film which made it an authentic psychological and moral document.

Q. I believe when you stated in reference to this movie, The Blue Movie, you said that it represents the cool world's attitude toward sex, is that correct? A. Yes, that is my belief.

Q. And you said it shows two people with gossip and conversation? A. Well, the kind of gossip and conversation that [83] two people might indulge in, in that situation.

Q. Is it your testimony that this cool world attitude towards sex is portrayed through the con-

versation or through the acts that you witnessed? A. Through the acts, it all meshed as though it were quite an ordinary occasion, not a special occasion when the emotions are raised to a high pitch of sexual feelings.

Q. It might be fair to say that the conversation made no difference in your estimation? A. I regard it merely as irrelevant and incidental.

Q. So the theme of the movie then is essentially what you see, not what you hear, is that correct? A. Yes, I should say that, yes.

Q. How many Andy Warhol movies have you seen specifically, if you recall? A. Oh, I should say about 10, eight or 10.

Q. Was there any story in this movie? A. Any what?

Q. Any story? A. A storyline, I think you mean?

Q. A plot line? A. To this movie?

Q. The Blue Movie, yes. A. No.

Judge Moldow: It is just boy meets girl and that is the way it stays, right?
The Witness: Yes.

Q. Mr. Tyler, you might recall, when you saw the movie, could you hear the sound, did

you have any difficulty hearing what was said at times? A. Yes, it was a little low.

Q. You also testified on direct testimony that this movie was not lewd, in your opinion? A. Yes.

Q. Do you think you might venture your opinion as to whether or not it might be lewd to anyone else?

The Defendant's Counsel: That is objectionable.

The Presiding Judge: Yes, sustained.

The District Attorney: Well, Your Honor, I think--

The Presiding Judge: Well, let us get his definition of lewdness, if that is what you are trying to get at.

[85] The District Attorney: Yes, I was getting to that.

Q. You said this movie was not lewd? A. Yes.

Q. What would be lewd to you, what would be a definition of lewdness to you? A. Well, I think the sex films that are shown on 42nd Street, sexploitational, which is highly suggestive and produced essentially to excite the sexual feelings.

Q. Do you call these movies sexploitational? A. Yes, more or less.

The Presiding Judge: Sexploitational?
The Witness: That is more or less a slang word for these films.
Judge Moldow: That is a trade word?
The Witness: Yes.

Q. These are the theatres on 42nd Street and Eighth Avenue in this area? A. Yes.

Q. Those movies that are shown up there? A. Yes.

Q. Have you seen many of those? [86] A. A few.

Q. How many? A. Two or three.

Q. Two or three? A. Yes.

Q. Now, what acts took place in those movies, that would make that lewd and differentiate it from this movie that we saw here? A. Well, it is an act that creates lewdness, the sexual act is perfectly normal, nothing lewd about it.

The Presiding Judge: The sexual act?
The Witness: The way it is treated, yes.

Q. How was the act treated in those movies to make out your definition of lewdness? A. Well, everybody leers, there are all kinds of exhibitions of anatomical parts, it is kind of a flirtation, all seems very naughty and lascivious according to a kind of late 19th century idea of what is, for example, the Fanny Hill movies that I remember best.

The Presiding Judge: Well, those pictures that you have seen, and which you label as sexploitation pictures, to your recollection, sir, [87] do they portray the act of copulation and simulate copulation?

The Witness: Very much simulated.

The Presiding Judge: As simulated as the Blue Movie that we saw?

The Witness: No, not like this. This is—

The Presiding Judge: Not as explicit as this?

The Witness: Yes, literal, not as literal at all.

The Presiding Judge: Because they excite or offer excitement of more than they actually deliver?

The Witness: Yes, that is putting it well, yes.

The Presiding Judge: And the fact that it actually delivers, and quotes around delivers, you say is not lewd, is that correct?

The Witness: That is correct.

The Presiding Judge: The picture that merely titilates--

The Witness: (interjecting) Yes.

The Presiding Judge: (continuing) -- is lewd, but a picture that actually shows copulation [88] is not lewd, is that your definition, sir?

The Witness: That's right.

The Presiding Judge: All right, I just wanted to understand it.

The Witness: Yes.

The Presiding Judge: Thank you. Anything else?

Q. Mr. Tyler, with your knowledge of movies, do you know if there was a script written for this movie?

The Defendant's Counsel: That is objected to. The witness has already testified that there was no script. As to whether there was a script written, I think the witness already testified that he saw no story line.

Judge Moldow: He said he saw no plot.

The Presiding Judge: Well, a script is one thing. You mean a shooting script?

Q. Do you know what a shooting script is?
A. Yes.

The Presiding Judge: All right.

A. (continuing) Well, usually the dialogue is improvised in a Warhol film. Maybe there is a rough script, [89] the actors don't necessarily follow it. They improvise as they go along, but there is nothing like, as far as I know, certain writers have been asked to write scripts, then these scripts are promptly read and tossed aside. The actors memorized what they believed, and went ahead and said what they pleased.

Judge Moldow: Isn't it true that in the Blue Movie, two-thirds of the film is devoted to the couple, the man and woman, in bed? Would you answer aloud, please?

The Witness: Oh, yes.

The Presiding Judge: We have to put it on the record.

The Witness: Oh, I am sorry.

The Presiding Judge: He can't put down a shake of the head.

The Witness: I am sorry.

Judge Moldow: Isn't it also accurate that the remaining third, substantially comprises the same two parties nude in the bathtub together?

The Witness: Yes.

Judge Moldow: So that the entire film [90] consists of either the man and woman in bed, or nude in the bathtub, isn't that correct?

The Witness: Yes, approximately, yes.

Judge Moldow: Isn't that substantially similar to the method in which the sexploitation films that you referred to as lewd, proceed, where almost all the time that the spectator views the scene, he is seeing some of sex conduct?

The Witness: They are parallel but not alike at all because they are done in an entirely different spirit, and also they are absurd concoctions of plot which is exploitational, whereas the method here is to be very natural, very ordinary, matter of fact.

Judge Moldow: You say it is the spirit which distinguishes them?

The Witness: I think it is, and the fact that there is no affectation about the fact that the two people don't seem very much interested in either other, especially the

woman seems quite bored, gives very little cooperation to the man.

The District Attorney: Mr. Tyler, I have [91] one or two further questions.

The Presiding Judge: This book, Sex Psyche et cetera In The Film, has it been published yet?

The Witness: The copies are off the press. The publication date is the 22nd of this month.

Q. Who is the publisher of that book? A. Horizon Press.

Q. How long is that book? A. Oh, it is about 250 pages. There is a copy of it. (Indicating)

Q. And, how many pages is the chapter, how long is the chapter devoted to the Blue Movie? A. I think it is about eight pages.

Q. Eight pages? A. Yes.

Judge Moldow: Is there any photograph taken from the movie, accompanying--

The Witness: (Interjecting) No, the book is not illustrated at all.

The District Attorney: I have no further questions.

The Defendant's Counsel: Your Honor, I [92] want to offer the book in evidence.

The Presiding Judge: Any objection?

The District Attorney: I have no objection.

The Presiding Judge: All right, received as Defendant's Exhibit A.

The Defendant's Counsel: I bought the book Saturday.

The Presiding Judge: You bought it?

The Defendant's Counsel: Yes.

The Presiding Judge: Defendant's Exhibit A in evidence.

(Whereupon the book, 'Sex Psyche et cetera In The Film", was marked Defendant's Exhibit A in evidence.)

The Presiding Judge: One question, if I may. Do you have any questions?

The Defendant's Counsel: No questions.

The Presiding Judge: I want to make certain I understand what you said in one area. You say you found the picture had a social value, social redeeming value. For what reason, sir?

The Witness: Because it represents an [93] attitude of modern youth towards sex, and I think that is very vital.

The Presiding Judge: Would you label it as the theme of the picture, the underlying theme?

The Witness: Yes, I really would.

The Presiding Judge: So this would be the quote cool end quote modern attitude of the modern generation towards the sex act?

The Witness: Yes.

The Presiding Judge: All right.

(Witness excused.)

The Defendant's Counsel: The only question I have is what time the Court closes down here.

The Presiding Judge: We are getting a little tired, and it is getting a little late, let us try one more witness anyhow.

The Defendant's Counsel: All right.

Court Officer Joseph Hughes: Stand up and raise your right hand, and face the Judge.

(Witness complies.)

Judge Moldow: Do you solemnly swear to tell [94] the truth, the whole truth, and nothing but the truth, so help you God?

The Witness: I do.

Court Officer Joseph Hughes: Sit down, please. Give your name, address and occupation.

The Presiding Judge: Your name?

The Witness: Charles Winick, C-H-A-R-L-E-S-W-I-N-I-C-K, address 160 Riverside Drive, New York, New York. I am a professor of sociology at the City University of New York.

The Presiding Judge: Professor of Sociology?

The Witness: The City University of New York.

The Presiding Judge: All right.

CHARLES WINICK, witness called on behalf of the defendant, residing at 160 Riverside Drive, New York, New York, occupation professor of sociology at City University of New York, having been first duly sworn by Judge Moldow, testified under oath as follows:

Direct Examination by the Defendant's Counsel:

Q. Dr. Winick, have you had any occasion to deal with mass media? [95] A. Yes. I have spent a good part of the last 20 years studying the effects of mass media, especially on young people. The subjects I teach have to do with mass media. I spent two years preparing a report for the Joint Commission of Mental Health of Children, a congressionally funded agency, on the effects of mass media on the behavior and health of young people. In 1961 to 1967, I was chief consultant at the National Broadcasting Company television network on the admissibility of material to be shown on the television network. In 1957--

The Presiding Judge: You mean legally admissible?

The Witness: No, whether it was in conformance with contemporary standards, and the manner in--

The Presiding Judge: C.B.S.?

The Witness: N.B.C.

The Presiding Judge: N.B.C.

The Witness: (continuing) In 1957 I began a two year study supported by the Ford Foundation, on the taste and censorship which resulted in a book published in 1959, called [96] A Taste and The Censor. In 1964, I received the George Foster Peabody award for distinguished achievement and meritorious public service in television, for a book which I wrote on the effects of television on young people called For The

Young Viewer. From 1959 through 1961, I was the director of basic research for the J. Walter Thompson Company, the advertising agency, developing a program of research on the effects of mass communications. I have been asked by--

The Presiding Judge: The purpose of what?

The Witness: The effects of mass communications.

The Presiding Judge: Mass communications.

The Witness: I have been asked by, and am currently preparing, I have been asked by the President's Commission on Obscenity and Pornography, which is currently in existence, to submit a proposal to it for techniques for studying the effects of nudity in films on young people. I published about 250 articles in professional journals, and 10 books concerned--many of the articles and books [97] concerned with mass media. My last book which was called The New People, was published in April of 1968. It is particularly concerned with the changing attitudes towards sex in the United States. The longest chapter in that book deals with the presentation of sex in movies. I have, at various times, been a consultant to the U.S. Senate Subcommittee on Juvenile Delinquency in its investigation of pornography, and I have been consultant to the New York State Assembly, and various other legislative groups. I have spent a lot of time studying these subjects. I have taught them for about

20 years. Before coming to the City University, I taught at the University of Rochester, M.I.T., and Columbia and I have directed about 400 studies on the effects of mass media on young people. My articles have appeared both in professional journals such as Social Problems, publishing quarterly, and in film publications such as Films and Filming. I should mention that my doctorate is in sociology which I received at New York University in 1950. I am a [98] fellow of the American Sociological Association, and also a licensed psychologist in New York State.

Q. Now, Dr. Winick--

The Presiding Judge: Is that all?

Q. (continuing) --at any time has the United States Government ever asked you to testify on its behalf in an obscenity case? A. Yes, in the case of a film, I Am Curious Yellow, the U.S. Attorney asked me to testify for the film.

Q. Now, Dr. Winick, you--

Judge Moldow: Did you testify?

The Witness: I testified but not for the government, for the importer.

Judge Moldow: But you viewed the film?

The Witness: Originally at the request of the government.

Q. Now, Dr. Winick, are you aware of the dramatic change in conventional and unconventional sex as depicted upon the screen?

The District Attorney: Objection, Your Honor.

The Presiding Judge: Sustained.

Q. Are you aware, Dr. Winick, of the change in the [99] sexual climate, the films being produced today as against five years ago?

The District Attorney: Objection, Your Honor.

The Presiding Judge: Don't we know that as individuals, if there is a change?

The Defendant's Counsel: Well, if the Court will take judicial notice of the fact that there has been a change in both the conventional and unconventional sexual depiction--

Judge Moldow: You have been asking him are you aware it is a fact, and assuming the fact not in evidence. If you want to ask a question about the fact, I have no objection to it, but your questions are highly improper in form as far as I am concerned.

The Defendant's Counsel: Withdraw the question.

The Presiding Judge: Sustained.

The District Attorney: You are sustaining the question--

Q. Dr. Winick, did you see the Andy Warhol Blue Movie? A. Yes, I saw it last Thursday evening.

[100] Q. And, you saw the movie at whose request? A. At yours.

Q. And, when you saw this movie, Dr. Winick, was this movie shown to you and several others in a private screening room? A. Yes, at the Preview Theatre in the West 40's.

Q. Now, when you saw the Blue Movie, did you see any social value in the Blue Movie? A. Very much so. I think that the film presents a growing and important point of view about sexual behavior by a director who represents increasingly the views of a great many people, a film which enables people to explore their own attitudes in a constructive way, and represents an important statement about private life, and personal behavior, by a film director who many people are coming to regard as someone who speaks for them. I think that more and more people are looking to films for this sort of reinforcing of their views and attitudes which they previously got from novels, and other printed material. This film, has the merit that I suggested, and I also think that it has a certain amount of clinical interest in the presentation of two [101] different character types, a non-responsive woman who is quite a celebrity in her own way, and an aggressive fellow, and I think there is a great deal of clinical interest in the very realistic presentation of their sexual behavior, without any attempt to make it stylized or to build in artificial values, or to make it hokey and to titillate the viewers. I think none of these things are found in the film.

Q. Did you find this film sexually stimulating?
A. Exactly the opposite. I would say the film is not aphrodisiac, it would dull the sexual interest because it makes the sexual behavior of the couple routinized, and not following the typical kind of crescendo approach of many movies with overpowering music building up to a climax, and then a shot of waves breaking on a shore, and that sort of thing. That sort of thing is what encourages the viewer's imagination to roam and feel free to be stimulated, if need be, but this was a flat and realistic approach, nothing for the imagination to do, and, therefore, it is so clinical, almost medical in the manner in which it presents sexual behavior, that my own feeling is that would clearly be a sexual depressant, [102] a non-aphrodisiac, in other words.

Judge Moldow: To everybody?
The Witness: To most people.

A. (continuing) The tawdriness of the surroundings, the lack of carefully selected costumes, the flatness of the image on the screen, the non-use of the usual long shot, medium close-up of movies, the lack of the make-up, you can see even pimples on the back of the girl, as I recall, and so forth, all of these things certainly make sex a less mysterious and provocative act, but a kind of mundane, a casual activity, and the fact that it takes so long, also serves to, I think, make it anti-sexual to most people.

The Presiding Judge: You said, excuse me, there was no room in this picture for

the imagination to roam as to the sex act, is that what you meant?

The Witness: Yes, sir, in contrast--

The Presiding Judge: Well, actually, didn't you find that the sex act was performed most explicitly in the picture?

The Witness: Well, I am not so sure of that. In other words, I still think there was a certain [103] amount of ambiguity about what was happening because there was no close-up.

The Presiding Judge: That is you didn't actually see the male organ penetrate the vagina?

The Witness: Yes, that's right. I think, if I may be permitted, there was a certain amount of ambiguity about what had occurred, but--

The Presiding Judge: What impression did you get as to what occurred, Doctor?

The Witness: Well, I would say that it is likely that in fact they had engaged in sexual intercourse, but I would say that I couldn't be sure of it.

The Presiding Judge: Well, all right. Thank you.

Judge Moldow: Wouldn't you also say the intention of the film is to convey the impression that they had?

The Witness: I would say so.

Q. Doctor, did you find this film lewd? A. No, not at all.

Q. Did you find it salacious? [104] A. No.

Q. Did you find any forms of unconventional activity in this film? A. Unconventional? Well, it isn't clear whether the couple is married. Presumably they are not married although they do say they are married jokingly, that they are for the purpose of the film, but apart from the fact that they are not married, seemingly engaging in sexual intercourse, there was no sadism, no fellatio, and so forth, so I would say it was a representation of straight sex with no perversions or attempt to hinder them.

The Defendant's Counsel: I have no further questions.

Cross Examination by the District Attorney:

Q. Dr. Winick, how many movies of the sort of Blue Movie type movie have you seen? A. Well, I don't know what you mean by that.

Q. I will reframe that. Withdraw the question. Have you seen any other Andy Warhol movies other than the Blue Movie? A. Yes.

[105]Q. How many others? A. Well, The Chelsea Girls, most recently.

Q. Have you seen any of the movies characterized as sexational movies, the movies that are displayed at 42nd Street and Eighth Avenue? A. Occasionally, yes.

Q. About how many of them have you seen?

A. I go to them occasionally in the line of duty, maybe two or three a year, perhaps, something like that.

Q. Would you differentiate between the movies of that type and The Blue Movie? A. Very much so because these movies try to present sexual behavior in a titillating manner, surrounding the activities with as many provocative situations and sounds and music, and removal of clothing, and so forth, as possible, and they have no, they are not trying to make a statement about the situation of contemporary men and women in this country today. They don't have poetical discussions, they don't have discussions on the role of the police in modern society, they don't have a discussion of Franz Klein (phonetic) as a modern artist, and I think the director was trying [106] to bring in these modern arts, Vietnam, the role of the police, and so forth, to indicate the relationship between sexual behavior and the larger political attitudes, and these 42nd Street movies in no way try to bring in such larger social considerations, or bring in political attitudes, and they surround sexual behavior with a lot of hocus-pocus and costuming, and so forth. The very art of the film is that, its lack of artifice, so I would say that it is totally different than the exploitation movies.

Judge Moldow: Don't those exploitation movies also carry out that theme by the kind of title that they give the film, as well, in order to attract an audience looking for titillation?

The Witness: The kind of--

Judge Moldow: The title being the name they give the pictures?

The Witness: Yes, I would say so, sir. They often have titles like Week-end Orgy and that sort of thing.

Judge Moldow: How about the title of this film, does Blue Movie have a connotation to you in the [107] film industry?

The Witness: Well, I don't know what the industry connotations are. I interpret the title as the artist's semi-jocular of what he is doing, just as you know that he is there in the room photographing, and yet you don't know that he is there. I think he called attention to himself several times in the course of the film, and I think that he used the title Blue Movie as a kind of satiric way to indicate that society, and many people, might think what he is expressing in Blue but the viewers wouldn't think it was blue.

Judge Moldow: And if it wasn't intended satirically, what could it mean directly, Blue Movie?

The Witness: The connotation of something that is frowned upon or prohibited; I don't know that to me it would mean specifically a stag film.

The Presiding Judge: Pornographic films?

The Witness: No, a film having sexual content. I wouldn't say that that would have connotation of pornography necessarily.

[108]Q. Doctor, before your last answer, you commented on a Vietnam police activity. What is your reason for bringing in this; because of conversation that came out of the movie itself, The Blue Movie? A. That's right.

Q. So it is your feeling that the conversation lends credence to the socially redeeming value of the movie, is that correct? A. No, I wouldn't say it lends credence to the socially redeeming value. I would say that the sort of free falling discussion of larger national concerns, personal concerns in Easthampton, the theft of a painting, the throwing back and forth from the present to the past to what is going to happen next week, this is the way people do think and talk in their personal lives, and intimate moments on the basis of what we know about this, and I think the film very sensitively caught this, and tried to present that in these intimate moments people may bring in discussions of a variety of different subjects, and drive to another subject without terminating one subject, and so forth. I think that is one of the things that make the film very impressive.

[109]Q. Doctor, if I asked you, could you relate to the Court as briefly as you can, as simply as you can, what you feel the theme of this movie was or is? A. I see the theme of the film to be that sexual experience may be a very lower case kind of situation without huge peaks and valleys of experience. It may be a relatively mundane activity, and not of any great consequence, an encounter between two people who have known one another, and the experience, however, is a

personal expression which is unique for the person, and which the person reveals himself. I think both the male and the female are telling a great deal about themselves while they are engaged in all this discussion and activity, and that would be for the viewer to see the extent to which he does not identify with these people, and the extent to which he can form a judgment that part of the behavior is clinical or pathological, and part is not, and so forth. Well, that is a complicated way of answering your question.

Q. From that, would it be fair to say that your opinion is that the theme of this movie is the portrayal of the sex act without the great highs and lows that could be a natural, real, not at times a very elevating or very [110] depressing state? A. I would, Oh, I think that would be a fair statement.

Q. Would it also be a fair statement, it really doesn't make any difference what they talk about while they were doing this act, they could have talked about World War II rather than Vietnam, none of that would have made any difference? A. I wouldn't say that. I would not try to estimate how most people would view the film based on my experience in interviewing thousands of people about their reactions to hundreds of films, and I have no idea what my reaction would be or other people's reaction would be if they were talking about something else. I can only evaluate my impression of what--evaluate my impression of what they are talking about, and they did elect to,

choose to talk about the war in Vietnam, attitudes about the police, and so forth, and I think the fact that they did talk about this is extremely important. I have no idea what they might have talked about, they didn't talk about anything else, that is what they did talk about.

Q. Doctor, going back to your statement on direct [111] examination that you did not feel this movie was made with the idea of titillating the viewer? A. Yes.

Q. You expressed that idea, is that correct? A. Yes.

Q. You did not get the feeling when you were viewing this movie that there was at times during the film, a preoccupation with someone observing the acts that they were doing? A. There were at least two points, in one case the couple moved to permit a profile shot, and in the other case they referred to this movie, but I think that this is part of the attraction of the film within a film situation, and this is part of Warhol's message, that the relationship between art and reality is very blurred, and who knows when one begins and the other ends. I don't believe that there was in any way, in any place, any attempt to call attention to the sexual behavior in any titillating manner at all.

Q. But you do admit that at times there was a preoccupation from the two characters in this movie with the fact that they were being observed or, if you will, even, filmed? [112] A. There is some preoccupation?

Q. Well, they were conscious of this? A. On two occasions in the course of this relatively lengthy film, they communicated to the audience there was a camera in the room, but it was done very briefly in the first case to the profile shot, in the second case referring to this movie, the two incidents took maybe 15 seconds, something like that. I would say that is hardly any attempt to call attention to someone viewing in a titillating way.

Q. Doctor, your contention is that this performance was realism? A. Yes.

Q. That is the way it really is? A. One way.

Q. One way it could be? A. Yes.

Q. How does this realism fit in with the fact that these people are also acquainted with the fact they are being photographed while they are doing this act, they are being filmed, is that realism with two people in bed, they are being filmed; how does that fit in with [113] your argument? A. Not an argument.

Q. Excuse me, your statement? A. One of the themes in many films such as Blow Up and films of this sort, is that the boundary between the real and the fantasy, and between the film maker and the film is very blurred, and part of the satisfaction that the audience gets from these modern films is a feeling of ambiguity about the theme with respect to reality, as this really happens, in other words, or is the film maker there.

The Presiding Judge: Do you mean there was ambiguity in the film as to what they were doing?

The Witness: I would say there is no ambiguity as to what they were doing, sir. I would say that the relationship between the film maker, and the fact that there was a film being photographed, is presented in an ambiguous way.

The Presiding Judge: I don't understand your statement. I am sorry.

The Witness: Well, people come into a movie house to see a film, they know that somebody shot a film with a camera, somebody was there, [114] therefore was watching what the actors or performers or protagonists were doing while he was shooting the film, but we pretend these directors or camera men are not a part of it. The attraction of a number of modern films, this would be I Am Curious Yellow, is that the director communicates the fact that he is there making the film, and he wants you, the audience, to know that he is there making the film, and then he takes a number of steps away, and there you are viewing the film again. I think this game about where is the director and is he there would be the attraction of this modern group of films.

Judge Moldow: Is that an attempt to make the spectator identify with the director rather than with a protagonist?

The Witness: I think one of the satisfactions, sir, of many of these films is pre-

cisely that, that the audience gets a directorial satisfaction to some extent, and that is no more creative satisfaction than I think an audience gets looking at something on a screen.

Judge Moldow: Is that a voyeuristic satisfaction being substituted for a directorial satisfaction?

The Witness: That is possible, but I think [115] that it is more the identification with the artist and the director, than the peeking through the keyhold kind of satisfaction.

Q. Doctor, I think you communicated that this movie was in the trend of more realism in movies, would you say? A. I think all of Warhol's films appear to be stressing the lack of artifice, and I think the need to identify, the need to identify with the real, yes.

Q. It was your testimony that being able to see pimples on the back of the female actress, and the lack of fancy costuming or make-up, or much make-up, that all these things would tend to cause less titillation on the part of the viewer because it is more real, is that correct? A. I would say so, yes sir.

Q. Would you say as a flat statement that realism as opposed to the trumpets sounding and the music coming in, would in most cases never titillate the public to the degree that a movie with such things as that would? A. In general, I would say so, for the same reason that we know that the nude figure is far less likely to [116]

titillate most people than the partially clothed figure. In other words, when the imagination is permitted to work, then people's emotional energy begins churning, and they begin to have fantasies, and ruminations, or when you see the nude figure, the pimples on the back, there is far less opportunity for the imagination to roam, and therefore the nude figure is almost necessarily less titillating than the partially clothed figure, which is the asexuality of most nudist camps.

The Presiding Judge: Most?
The Witness: Nudist camps.

Q. Sir, in other words, a picture of a woman totally nude sitting on a couch with no clothing on, would be much less titillating than a picture of a woman sitting on a couch with a very brief bathing suit on? A. Yes, absolutely, and fixed to that there is a study by the Institute of Sex Research on it and by the Commission of Obscenity and Pornography in which I mentioned that fact, that complete nudity is uniformally--I should say uniformally less titillating than partial nudity.

[117]The Presiding Judge: Did you ever read Anatole France's Penguin Isle?
The Witness: Yes, sir, I did.

Q. Doctor, you testified to the medical approach of this movie? A. Clinical.

Q. The word, I think, medical, was used? A. Is it medical or clinical? I think it was clinical.

Q. I think both words were used. Would you please elucidate further on this medical-clinical approach? A. Yes, I can very well see showing this movie to a class at medical school or a group of residents in psychiatry, and presenting these two characters as types, the female, the distant, aloof, non-responsive woman, and the energy getting sexually aggressive male trying to achieve his goal while the woman is not really cooperating with him in this. I think that there is material in this movie for many hours of lectures to such groups, medical students, psychiatric residents.

Judge Moldow: Would you present it to [118] a college group?

The Witness: No, of course not. I would present it to the groups of the sort I mentioned, people who had a legitimate interest in personal pathology.

Judge Moldow: A college group talking abut age level of between 18 and 22?

The Witness: Well, I wouldn't present it to a college group unless it were a highly specialized class in psycho-pathology or something like that.

Judge Moldow: You wouldn't present it to the general population between the ages of 18 and 22?

The Witness: Well, that would depend. I think that I would in general, I would have confidence that the nature of the film is such that there would not be--

Judge Moldow: Would you present it, though?

The Witness: You mean would I permit such people to see it or ask such people to see it?

Judge Moldow: Would you present it to such a group?

The Witness: Not to an undifferentiated--

[119]The Presiding Judge: Yes?

The Witness: I would say so.

Judge Moldow: Do you have reservations?

The Witness: Well, I hesitated for a moment, but on balance, I would say so.

The Presiding Judge: And, for what purpose would you present to such an undifferentiated group?

The Witness: That is why I asked.

The Presiding Judge: For clinical observation or study or general entertainment?

The Witness: Well, I don't know that I would accept those two categories.

The Presiding Judge: Well, I am asking you, if you would be so kind, as to answer whether which of those categories?

The Witness: Well, I have already said for clinical observation. It certainly has--

The Presiding Judge: Has a value?

The Witness: Has a value, and I would state that as an example of an important kind of theatrical film and I would say an entertainment film.

[120]The Presiding Judge: Thank you. Now, you said that the woman was not cooperative in this picture?

The Witness: Not to the extent that her boyfriend appeared to wish.

The Presiding Judge: Well, she did engage in what appeared to be sexual intercourse?

The Witness: Yes, that's right, sir, but--

The Presiding Judge: She did gyrate her buttocks as if engaging in the act, is that correct?

The Witness: Yes, sir, that's right.

The Presiding Judge: She did kiss and embrace him?

The Witness: Occasionally, yes.

The Presiding Judge: She did fondle the parts of his body?

The Witness: Yes, that's right.

The Presiding Judge: She did soak his penis in the shower?

The Witness: Yes.

The Presiding Judge: And raise it from a flaccid state to at least a semi-erect state?

[121] The Witness: Yes, but all of those--

The Presiding Judge: And you would say that was not cooperation?

The Witness: All of those things are true but there was a kind of distance and lack of involvement in it.

The Presiding Judge: Isn't that true in most male and female relationships, that the male is the aggressor, and that the female is the resistant one, the one who wishes to be the subject of the aggression, isn't that generally true of females?

The Witness: I would say that.

The Presiding Judge: They want to be the one that pursued?

Judge Moldow: Maybe he is getting out of that field, he is in the mass media field.

The Witness: No, sir. In chapter 9 of this last book of mine which I mentioned called The New People, I have a very long discussion on the changing female-male sex role.

The Presiding Judge: You mean they are changing it?

[122]The Witness: Well, I think they are changing in a direction other than that which you just summarized, namely, that certainly the trend as we gather from the Kinsey studies of the 1940's and their repetition in 1967 is for woman to be more emancipated, if you will, more informed, more free-spoken, and so forth, and certainly that the direction which I believe the country is taking.

Q. Well, doctor, would you say this was a normal, if there is such a thing, was there a normal relationship between these two people in bed, or would you say it was somewhat abnormal?

The Presiding Judge: Well, that is a very ambiguous question. It depends on what is normal.

A. Yes, I would hesitate to reply.

The Presiding Judge: I think that is impossible. I think we can agree, we know that the sexual relations between male and female are rather normal.

The Witness: Yes.

Q. Do you think their responses were normal? [123] A. In the particular relation, pre-coition, it is the traditional kind of activity, and not any of the various perversions, so to that extent what we saw is normal activity.

Q. Would you say that their response to the acts of intercourse were usual and normal? A. I don't think it is possible to answer that, I think these people are presented as protagonists because they are unusual in some way, and therefore to that extent they are atypical, they wouldn't be performing a movie if they were people in the street.

Q. Doctor, did you have any trouble at any time understanding what was being said in the movie? A. I don't think so.

Q. Well, as far as the technical aspects of the film, the sound track, could you always understand what was being said by the actors? A. Certainly, most of it.

The Presiding Judge: All of it?

The Witness: I am sure there was a few bits that I didn't, I couldn't understand.

Q. And you would attribute that to what, the [124] movie itself, the sound track? A. It might have been the sound tract, but Warhol makes a point of trying to convey reality as it is, and the lack of focus of a number of his shots, I would attribute to the same reason, namely, that he is not interested in artifices, that he wants to present it like it is. It may be a particular print.

The Presiding Judge: Weren't there sections of the film that you saw, sir, where the lips were moving and the actors were apparently speaking but the sound did not come over?

The Witness: There were a few such sections. I attributed that to the particular print that I was viewing.

The Presiding Judge: There was a defect in the print?

The Witness: That is what I thought.

The Presiding Judge: Yes, all right.

Q. Did you detect any story or plot in this movie? A. No, it is not a film with a beginning, middle and end plot. That is one--It begins abruptly and ends abruptly.

[125]Q. How about a message, did you get any message out of it, did you come away with any message? A. No. I don't believe Mr. Warhol makes films with messages.

Q. Did you come away with a theme? A. A theme, yes, but a theme is not a message, and to

paraphrase what the theme of the film means in a couple of sentences, that is like saying Gone With The Wind is a story about a woman whose plantation burns down, who finally gets a plantation back. I think it is unfair, in other words, to take a work of art in one medium and try to summarize it.

Q. I think you did make an attempt earlier to? A. Yes, I did try to summarize the theme, right.

The District Attorney: I have no further questions.

The Presiding Judge: I have a question, sir. You have said that the picture, in your opinion, was not lewd?

The Witness: Yes, sir.

The Presiding Judge: What do you mean by lewd?

The Witness: By lewdness, I construe the [126] presentation of substantive material which presents sexual content in an offensive or pathological or titillating manner. I don't believe that is true of this film at all.

Judge Moldow: Or any part of this film?

The Witness: That's right.

The District Attorney: One more question. Excuse me, just a minute.

The Presiding Judge: Go ahead.

Further Cross Examination by the District Attorney:

Q. Doctor, is it your conclusion an act shown in a realistic setting is realism, that this movie would in no way ever titillate the public?

The Defendant's Counsel: Objected to, Your Honor, he has answered the question twice.

The Presiding Judge: Well, this is cross examination, we will allow it.

A. What do you mean an act, can you explain what you mean?

Q. One of your definitions of lewdness is that it would titillate the public? [127] A. That's right.

Q. You also feel that that movie shows the act of intercourse in a realistic manner? A. Yes.

Q. Therefore, would it be fair to say that that movie depicts the act of sexual intercourse in a realistic manner, assuming a realistic manner there would never be any titillation of the public? A. I don't think that is a logical inference. What I said, because we can't talk about a hypothetical movie without a hypothetical realistic presentation of sex. I can obviously talk about this film which exists, and we have seen it, and I have commented on how I think the realism of this sexual presentation will affect most people.

The Presiding Judge: Excuse me?

The Witness: I would say this was not lewd because it is a realistic presentation

of an act of coitus and does not seek to present that act in an offensive or pathological or titillating manner.

The Presiding Judge: Well, you are saying that an act is of a realistic act of sexual intercourse, [128] it does not titillate?

The District Attorney: That is my question.

The Presiding Judge: Is that your statement, doctor?

The Witness: As presented in this film, it does not titillate.

The Presiding Judge: How is it different in this film, what is the distinction characteristic of this film that leads you to conclude that the realistic presentation of an act of intercourse does not titillate?

The Witness: Well, sir, it is impossible to discuss how a hypothetical presentation--

The Presiding Judge: This isn't hypothetical. You saw the picture?

The Witness: Yes.

The Presiding Judge: Saw the act of sexual intercourse?

The Witness: Yes.

The Presiding Judge: You say it doesn't titillate?

The Witness: Yes, sir, that's correct.

[129] The Presiding Judge: Why?

The Witness: Because--

The Presiding Judge: What do you base that on?

The Witness: I am trying to empathise

with how most people would respond in feelings with seeing this film.

Judge Moldow: How old are you?

The Witness: Forty-seven.

Judge Moldow: Are you trying to empathise with the 20 year old population and the 30 year old population?

The Witness: I am talking about most people, and I have interviewed over 20,000 in the past 12 or so years on their responses to movies, and I think I have an impression of how different age groups did respond. Obviously, an older person, there are age differences and responses to this kind of material.

Judge Moldow: Do you measure their response in any other way but by taking ipse dixit?

The Witness: Yes, sir. In one study, I conducted, on A Man With A Golden Arm which appeared [130] in an article in the Journal of General Psychology in 1963--

Judge Moldow: This was at your case?

The Witness: Well, a film dealing with drugs. What I did, was to administer a questionnaire on attitudes toward drug use to several thousand young people before the film was released, and six months later I administered the same questionnaire, and some people had seen the film and some hadn't, and I compared the differences and I specially used objective measures such as this, wherever possible, of course, rather than just ask people what do you think or how does it hit you, because

people often have difficulty in discussing intimate subjects like sexual material or their own responses to such material, or they may have fantasies, or they do not have the ability or desire to put into words, and therefore we try to use objective measures, questionnaires data, and so forth.

Judge Moldow: Excuse me. Aside from the narcotics situation in the film you described, did you ever use that testing device in the film that had [131] contents of a sexual nature?

The Witness: No, that kind of an elaborate procedure.

Judge Moldow: Thank you.

The Presiding Judge: Yes.

Q. You didn't engage any groups of any other people for any particular movie, The Blue Movie, did you say? A. No, I think that any such test would involve a large sample of population, and obviously under the present circumstances, it hasn't been possible to get a reaction from a large sample of the population.

Q. Now, I will ask this question again because I don't think it has been answered. Is it your contention that a realistic showing of an act of intercourse would not titillate the public, yes or no?

The Presiding Judge: The general public?

The District Attorney: The general public?

The Defendant's Counsel: I object to that, Your Honor, on the ground the witness has testified that in this picture this act would not titillate the general public.

[132] A. I think that is honestly the best I can say.

The Presiding Judge: All right, we will overrule the objection but take your answer. All right, anything else of this witness?

The District Attorney: I have no further questions.

(Witness excused.)

The Presiding Judge: All right, the Court will recess until 10 o'clock tomorrow morning. We have some other matters.

The Defendant's Counsel: Excuse me, what time is that tomorrow?

The Presiding Judge: Ten o'clock. Is that satisfactory with everybody?

The Defendant's Counsel: Yes, Oh, sure.

The Presiding Judge: All right, continued until 10 A.M. tomorrow.

The Defendant's Counsel: One question, Your Honor?

The Presiding Judge: Yes.

The Defendant's Counsel: Would it be necessary, in the light of the question that Judge [133] Moldow asked me earlier, before the filming inside, where Mr. Parker Tyler saw a film a year ago, do you want me to testify on the record that it is an identical print?

The Presiding Judge: Well, if you will

state that on the record, and no objection, we will take your word for it.

The Defendant's Counsel: All right, will you take a stipulation?

The District Attorney: That that was the same?

The Defendant's Counsel: The one that Dr. Winick saw--

The Presiding Judge: The same one that we saw, People's 1?

The Defendant's Counsel: Yes, a duplicate print, a print that I have in my office.

The Presiding Judge: All right.

The Defendant's Counsel: All right, now.

The Presiding Judge: Thank you.

The District Attorney: Your Honor, that issue I did not argue, nor will I stipulate it is the same thing. I think it goes to the weight [134] whether or not it is the same but--

The Presiding Judge: Well, we will take Counsel's word for it.

The Defendant's Counsel: I am not talking about Mr. Tyler a year ago, I am talking about Dr. Winick now.

The Presiding Judge: All right.

The Defendant's Counsel: All right.

(Court adjourns for day.)

[135] September 17, 1969

Court Officer Joseph Hughes: Calendar number 103, Docket B19858, Saul Heller, charged 235.05.

The Defendant's Counsel: Good morning. Ready, Your Honor.

The Presiding Judge: Good morning. All right, proceed. Gentlemen, the case is with you, Counsel, I believe.

The Defendant's Counsel: Thomas Phillips.

The District Attorney: The People renew their application to exclude all other witnesses.

The Presiding Judge: All other witnesses, step outside until called.

The Defendant's Counsel: There are no other witnesses except the defendant after this.

The Presiding Judge: All right.

Court Officer Joseph Hughes: Stand up, raise your right hand and face the Judge.

(Witness complies.)

Judge Moldow: Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

[136] The Witness: I do.

Judge Moldow: Be seated, give your name, and address, occupation. Keep your voice up.

The Witness: Thomas Phillips, my address is 3 Cooper Place, Weehawken, New Jersey. My occupation is a writer.

THOMAS PHILLIPS, witness called on behalf of the defendant, residing at 3 Cooper Place, Weehawken, New Jersey, occupation, writer, having been first duly sworn by Judge Moldow, testified under oath as follows:

Direct Examination by the Defendant's Counsel:

Q. Mr. Phillips, for whom do you work? A. I work for the New York Times.

Q. How many years have you worked for the New York Times? A. Slightly over four years.

Q. What type of work do you do for the New York Times? A. I write radio news casts for WQXR. In addition, I am a free-lance writer and write articles [137] for newspaper publications, the Times, the Times Magazine, the Village Voice, Rolling Stone, and Pop and New York Scenes Magazine among others about the arts, film, theatre, popular music, books.

Q. Now, did you write any articles for the Village Voice? A. I wrote an article recently about the movie in question.

Q. Now, Mr. Phillips, how old are you? A. Twenty-seven.

Q. Are you married? A. Yes, I am.

Q. Do you have any children? A. Two children.

Q. When was the first time I talked to you, Mr. Phillips? A. Just last week, I believe.

Q. Now, did you see the movie, Andy Warhol's Blue Movie, prior to my talking to you? A. Yes, I did.

Q. Where did you see the movie? A. I saw it at the Garrick Theatre, Bleeker Street, [138] approximately two months ago.

Q. As a result of seeing that movie, did you have occasion to write an article on that movie? A. Yes, I did.

Q. And where was that article published? A. It was published as a letter in the Village Voice, although I sent it as an article.

Q. And, as a result of seeing this movie, did you form an opinion as to whether this movie had any social value? A. Yes, I did.

Q. What was your opinion? A. My opinion was that it did have social value.

Q. When you say it did have social value, what did you see in this movie? A. I thought that the movie was basically about the political situation in this country today.

The Presiding Judge: Hold that just a minute. You say it was basically--

The Witness: (interjecting) The basic theme of the movie was about the political--

The Presiding Judge: The basic theme of [139] the movie was what?

The Witness: About the political and social situation in this country today.

The Presiding Judge: All right.

Q. What do you mean by that, Mr. Phillips? A. Well, first of all, I think I know that the characters in the movie spent a great deal of time talking about subjects such as taxes, the war, presidential election, police. I think that their conclusion was very clear, that they felt along with many other people in this country, that they had been somehow cheated, that their votes and their taxes, had not only been wasted, but had actually been turned against them, and in connection with this, I feel that the movie offered not only an outline of their political and social dilemma, but also a solution of sorts.

The Presiding Judge: Also of what?

The Witness: Also a solution in personal terms. I feel that--

Judge Tolleris: What solution would you say?

The Witness: The viewpoint expressed by the movie, I would say, is that in the face of political [140] powerlessness, in the face of evil over which there is seemingly no control, the thing to do is to stay home, refuse to contend with the situation, and find what happiness you can in private personal relationships.

Q. Now, Mr. Phillips, did you find this movie to be lewd? A. No.

Q. Did you find this movie to be salacious? A. No.

The Defendant's Counsel: No further questions, Your Honor.

Transcript of Proceedings

The Presiding Judge: Cross.

Cross Examination by the District Attorney:

Q. Mr. Phillips, how many movies of this sort have you seen? A. What do you mean of this sort?

Q. How many Andy Warhol movies have you seen? A. Five, six, seven, quite a few.

Q. Have you seen any other of the sex type movies that are played on 42nd Street or Eighth Avenue? [141] A. A couple quite a while ago.

Q. You felt that these ideas about Vietnam and the political situation and taxes, these all came from the conversation? A. Right.

Q. Did you learn anything about these? A. Well, let's say that I didn't learn things in terms of facts, I learned, but I think it was, well, it was a dramatic, it was a presentation of feelings which are on a large scale in this country. I am not saying these people were brilliant or expressed their ideas any better than anyone else, but these ideas did have some substance to them.

Q. When you saw the movie at the Garrick Theatre, could you always hear the conversation? A. No, not always. No.

Q. Why not? A. Well, it is what is called natural sound, in that you don't--

The Presiding Judge: You don't hear natural sound?

The Witness: No, natural sound is the way [142] you would normally hear a conversation in a room. You don't always pick up every word, it is a technique that is used quite a bit.

Judge Tolleris: A technique or bad sound track?

The Witness: No, I think it is more a technique, you know, in the different reels the sound track was on a different level, and the last reel of the movie the sound track was very close up. In the second reel, the interior scene, it was kind of far back, I think that was.

Judge Moldow: The sexual intercourse scene took place nowhere in the second reel?

The Witness: I may have my reels mixed up.

Judge Moldow: The sexual intercourse was in the first reel, that was accompanied, I think, where the parties were entirely nude through the whole reel, were talking casually.

The Witness: I am sorry, I had my reels mixed up.

Judge Moldow: The sexual intercourse was on the first reel, that was a past coital relaxed [143] state where the parties were entirely nude throughout the whole reel, were talking casually.

The Witness: I am sorry, I had my reels mixed up. Let me say then, I am

sorry, that the sexual intercourse in the beginning was far off and you couldn't pick up all of it, I think that went along with the whole aesthetic approach to the scene in which he made it somewhat remote, and also used the color, the color which apparently had some kind of a slide over the camera, and I think that both of these devices had a tendency to move the scene back from direct confrontation with the viewer, with kind of a distancing device which I had thought it was kind of effective.

Q. Now, Mr. Phillips, you previously on direct testimony stated that the theme, to you, embodied the idea that you can't contend with the forces outside, the best thing to do is stay at home, and that to you was essential--was the solution offered by the film? A. Well, it is a solution, yes, right, I think so, yes.

Q. Could you be a little more specific as to how [144] you arrived at that conclusion? A. Well, the whole movie is about that.

The Presiding Judge: Is about what?

The Witness: Well, what the movie--

The Presiding Judge: Just a minute. You said the whole movie is about that, and I said about what?

The Witness: Okay. Okay. What is the movie? The movie is a day spent, more or less a day spent, between two people.

The Presiding Judge: Engaging in sexual intercourse?

The Witness: Engaging in sexual intercourse, and a great deal more than that, engaging in a great deal of conversation.

The Presiding Judge: A great deal of conversation?

The Witness: I would say a great deal of conversation.

The Presiding Judge: Well, now, how much time did the whole film take?

The Witness: I believe it took an hour and 45 minutes, is that correct?

[145] The Presiding Judge: And, how much of that time was engaged in conversation?

The Witness: I did not time it, but I would say the bulk of it.

The Presiding Judge: The bulk of it?

The Witness: More than half of it.

The Presiding Judge: The bulk took place about what?

The Witness: About Vietnam, taxes, and--

The Presiding Judge: No, general conversation.

The Defendant's Counsel: I object to that, Your Honor. The question, may I say this, Your Honor?

The Presiding Judge: Yes.

The Defendant's Counsel: The question was the bulk of it took place as the conversation. Now if Your Honor is going to go into specifics, would you go a little more slowly so the witness carries what Your Honor's thought is?

The Presiding Judge: All right. The conversation that took place, Mr. Phillips, you said had to do, as I understood you, you said a great deal of the time was devoted to conversation [146] about the political and social situation, is that what you said?

The Witness: Yes, I did say that.

The Presiding Judge: All right. Now, about how much time was devoted to that type of conversation as you recall it?

The Witness: I would say about half an hour.

Judge Moldow: In other words--

The Witness: (interjecting) following the intercourse.

Judge Moldow: The relaxed reel, the second reel?

The Witness: Yes, between the bed and the bathtub was the political conversation.

Judge Moldow: Now, the third reel, the bathtub sequence when the two parties were nude in the bathtub for almost the entire reel, and wouldn't you agree that during this reel there was no political conversation?

The Witness: No, that was quite a whimsical reel.

Judge Moldow: Well, it was non-political?

[147] The Witness: Yes.

Judge Moldow: It was non-social as far as the conversation relating to any points of view?

The Witness: My point is, that I am--

Judge Moldow: No, I just want your agreement as to this.

The Witness: Yes, I do agree with that. If I may say so--

Judge Moldow: No, please, I will have to ask you to answer my question. The first reel, do you not agree, was spent by these two people entirely on the bed, that was the backdrop for their activities?

The Witness: No, there was a rather lengthy sequence before they ever got onto the bed.

Judge Moldow: Where were they sitting, on the edge?

The Witness: Sitting on the edge of it, walking around, yes.

Judge Moldow: After a few minutes of that, isn't it accurate to say that they got on their bed, and they removed their clothing, and that they were on that [148] bed for the rest of that reel, culminating in an act of sexual intercourse where explicitly the audience saw the female astride the male, and assisting his erect penis into her vaginal area?

The Witness: Yes.

Judge Moldow: Is that correct?

The Witness: Yes.

Judge Moldow: Was there a conversation of a political or social type during the first reel that we are talking about?

The Witness: I don't recall any of any length.

Judge Moldow: I think that is accurate. In other words, it was confined to the second reel which was possibly one-third of the movie. During that second reel, isn't it

true that the parties were nude the entire period of time?

The Witness: That is true but I didn't think that was particularly important.

Judge Moldow: But it was true?

The Witness: Yes, it was true.

Judge Moldow: All right. [149]

Q. Mr. Phillips, did you get this idea that the basic solution to all these problems was to stay at home because these two parties were in fact there in a home the entire film, is that how you came away with the idea? A. No, that metaphor is quite optional. The point is that what they did, they resolve it at two points, not to vote because they felt their votes didn't do any good, the woman talked about voting for Johnson in 1964, the man talked about voting for Adlai Stevenson in 1952. At another point, they resolved not to pay their taxes, and I think the general conclusion they draw from their position in the political situation, the best thing to do is not to be involved with it in any way, not to try to struggle to change it because of their condition of powerlessness.

Judge Moldow: That second reel, according to your testimony, could be released as a complete entity?

The Witness: No, I think my point is, and perhaps I didn't make it well enough, is that there is an organic connection between the sexual intercourse scene and the political scene. [150] To express it very

succinctly, that I think the sexual intercourse was an emblem of the alternative to struggling against corruption, and disorder in society.

Judge Moldow: And, of course, the manner of this portrayal could take endless possibilities as to presentation?

The Witness: I think it was present in the best possible way in this context, because it was, so it was so realistic, it was so non-hysterical, and in my view it was so normal, and positive.

The Presiding Judge: Normal and positive?

The Witness: I think it was a positive view of sexual intercourse.

Judge Moldow: It was a positive view of sexual intercourse?

The Witness: True.

Q. What do you mean by the word positive? A. I think that it was--all right, let's change the word, and I will say it was a very benign view of sexual intercourse in a friendly case.

The Presiding Judge: Most cases, aren't [151] they in most cases of sexual intercourse, are friendly, aren't they, except rape cases?

The Witness: I don't know. I think this was--I don't know. I am not familiar with all cases of--

The Presiding Judge: You are not what?

The Witness: I am not familiar with all cases of sexual intercourse.

The Presiding Judge: Well, in your experience, do you find that the usual act of sexual intercourse engaged in, by consentual adults is a friendly relationship?

The Witness: I do, and that is why I said that I felt this was a very normal instance of sexual intercourse.

Q. Mr. Phillips, you said this movie was not lewd, is that correct? A. That's correct.

Q. What is your definition of lewd? A. I would say that lewd means to me appealing to very--appealing to sexual interests in a very narrow way, in a very impersonal way.

[152] The Presiding Judge: Is it limited to sex?

The Witness: The word lewd, I believe that was--my impression of the word lewd is that it has to do with--

The Presiding Judge: Only with sex?

The Witness: That was my impression.

The Presiding Judge: Can it be a lewd act without involving sexual intercourse?

The Witness: I suppose I had the impression that the word lewd dealt directly with sex, somehow.

The Presiding Judge: I am asking what your view of the word is?

The Witness: To take another word, I think you have obscene acts that couldn't involve sex.

Q. Can you have lewd acts that do not involve sex? A. I don't know.

Q. What type of a movie would be lewd to you?

The Defendant's Counsel: That is objected to, Your Honor. We are on one movie, and that is the one movie we are here on today.

[153] The District Attorney: This defendant has stated that he has seen other movies of this type.

The Presiding Judge: Well, by a majority of the Court, the objection is overruled. Judge Tolleris dissents and votes to sustain the objection.

Judge Moldow: I would like to know what the witness means when he says something is lewd or not lewd.

The District Attorney: I will present the question.

Q. This movie was not lewd to you? A. Yes.

Q. Why was it not lewd to you? A. Because it did not present sexuality in a narrow impersonal way.

Judge Moldow: What would you consider lewd?

The Witness: I would consider a movie lewd in which there was attempt made as to characterizations or any attempt beyond pure simple straight depiction of straight sex where there was no kind of human involved at all, no kind of human relationship between the audience and the people on the screen.

[154] Judge Moldow: And if there was such an involvement, and such a relationship, then it wouldn't matter in what manner the sex was portrayed, no matter how explicit, whether you used telephoto lens when you showed genital parts, no part of that would matter?

The Witness: I couldn't actually say because we are just dealing with this movie.

Judge Moldow: All right, thank you.

Q. Have you ever testified before as to social redeeming value of any obscene material? A. No.

Q. Did you feel there was a plot line at all to this? A. Not in the conventional sense, all I felt there was a dominant theme, and I think that is what is required in a movie, not a plot.

Q. Would you please restate the dominant theme again? A. I think the dominant theme had to do with the political and social situation in this country today, and a possible solution to the political dilemma of people [155] finding themselves in a feeling of powerlessness to deal with institutions they feel are evil.

The Presiding Judge: You got that impression from the film?

The Witness: Yes, I did.

The Presiding Judge: All right.

Judge Tolleris: Was the sexual part of the film necessary?

The Witness: As I said, I think it is an organic connection to the political and social contents of the film, and as I expressed it before, I think it is in a sense an emblem of the alternative to struggling with evil and corruption.

The Presiding Judge: You mean if you can't fight evil and corruption, let's indulge in sex, is that it?

The Defendant's Counsel: That is objected to, Your Honor.

The Witness: No.

The Presiding Judge: I want to ask him--

The Witness: (interjecting) No, I would say--

The Presiding Judge: Excuse me. Counsel made [156] an objection. I overruled the objection and I would like to know whether that is what you feel, that is what you think it is about?

The Witness: Could you rephrase it again?

The Presiding Judge: You say, you justify this picture as a decent picture, suitable for display in public because you say it is a revolt against the futility of the tax situation, the war situation, and political situation?

The Witness: Yes.

The Presiding Judge: And you say that is all right, that is redeeming, has a redeeming social value? Did you express that resentment in your objection to wars, and the political situation and taxes, by indulging in the sex act, is that your thought?

The Witness: Not quite.

The Presiding Judge: Well, would you please make it explicit?

The Witness: Yes, I would say that the alternative to struggling against these things is not the sexual act in a limited sense, but personal [157] intimacy in a broad sense. I feel the movie is not about sex but with your personal sentiments of which sex is a major part, but I feel that the movie is about a relationship, and that is what it is all about, it is two people together.

Judge Tolleris: You say it is symbolic, that would be symbolic of a lot of other things?

The Witness: Yes, I would use that word.

The Presiding Judge: Couldn't that symbolism, in your view as a critic, be portrayed without all of the anatomical details of the sexual act indicated in two scenes?

The Witness: I suppose it could, but my view is that it was done in the best, most tasteful way, the way it was done.

The Presiding Judge: This was completely tasteful to show acts of sexual intercourse in the bathtub, manipulation of private parts by the female of the male in the shower, and intercourse on the bed, you say that is the most tasteful way to do it, sir?

The Witness: No, I think--

The Presiding Judge: Isn't that what you said?

[158] The Witness: I say within the context of this movie, I think it was well handled.

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The Defendant's Counsel: Now, Your Honor--

The Presiding Judge: Wait a minute, wait a minute, Counsel.

The Defendant's Counsel: Your Honor, I do not mind the Court questioning the witness, but at this point you have not given the witness an opportunity to respond to your questions before asking him another one.

The Presiding Judge: I am sorry if I have done that. (to the reporter) Mr. Oppenheimer, will you read back my last two or three questions there, and the answers.

(Whereupon the Reporter read back the following:

"The Presiding Judge: Well, would you please make it explicit?

The Witness: Yes, I would say that the alternative to struggling against these things is not the sexual act in a limited sense, but personal intimacy in a broad sense. I feel the movie is not [159] about sex but with personal sentiments of which sex is a major part, but I feel that the movie is about a relationship, and that is what it is all about, it is two people together.

Judge Tolleris: You say it is symbolic, that would be symbolic of a lot of other things?

The Witness: Yes, I would use that word.

The Presiding Judge: Couldn't that symbolism, in your view as a critic, be portrayed without all of the anatomical details of the sexual act indicated in two scenes?

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The Presiding Judge: This was completely tasteful to show acts of sexual intercourse in the bathtub, manipulation of private parts by the female of the male in the shower, and intercourse on the bed, you say that is the most tasteful way to do it, sir?

The Witness: No, I think--

The Presiding Judge: Isn't that what you said?

[160] The Witness: I say within the context of this movie, I think it was well handled.

The Defendant's Counsel: Now, Your Honor--")

The Presiding Judge: Read back before Counsel made his objection there. Repeat that question.

(Reporter read back the following:

"The Presiding Judge: This was completely tasteful to show acts of sexual intercourse in the bathtub, manipulation of private parts by the female of the male in the shower, and intercourse on the bed, you say that is the most tasteful way to do it, sir?

The Witness: No, I think--

The Presiding Judge: Isn't that what you said?

The Witness: I say within the context of this movie, I think it was well handled.

The Defendant's Counsel: Now, Your Honor--")

The Presiding Judge: Let me withdraw that question and say this. Could you say that the depiction, the photographic depiction of the intercourse and the manipulation of the male's private organ, was [161] a tasteful way of showing the actor's dissent with taxes, war and politics?

The Witness: I think that it was a tasteful way, and I base this on other reasons.

The Presiding Judge: All right, I just want to get your thinking. Thank you.

The Defendant's Counsel: May I ask the witness to continue his explanation, Your Honor?

The Presiding Judge: Yes. We have no objection to that.

The Defendant's Counsel: All right.

The Witness: Well, I feel that one of the major reasons that I felt it was tasteful, and more tasteful than the sex scenes one generally sees in movies which do not include genital organs, was that it was so realistic that it was relatively normal compared to the hysterical and exaggeration that appear in the cleverly censored sex films.

Judge Moldow: Do you prefer to see genitalia during sex scenes in movies?

The Witness: I prefer, yes, I would rather see it than a cleverly cut scene with all kinds of [162] mysterious implications.

Judge Moldow: All right, we have your view.

The Presiding Judge: Go ahead.

Q. Mr. Phillips, if the conversation had been different, if they had talked about other things, would that have made a difference?

The Defendant's Counsel: Objection as not being relevant.

The Presiding Judge: Sustained.

Q. You say that these problems of Vietnam and taxes, and solutions, as being one of the acts of sexual intercourse or intimacy between people, these are general problems of the public, everyone is conscious of these? A. A great number of people.

Q. And this is a solution to these, if you are faced with a frustration and the outside world problems, there is a solution? A. A solution.

Q. Would you have any compulsion about showing this movie to anyone, any member of the general public? A. Well--

Q. These are problems, this is a solution to problems? [163] A. Are you talking about age groups?

Q. First, age groups? A. Well, I don't think I would show it to someone---well, I think it is for adults, the subject matter is only for adults. A. Over 21?

The Presiding Judge: Excuse me, what age do you consider being an adult?

The District Attorney: Your Honor, could I conduct a cross-examination with more than two or three questions? Every time I ask one question, I only get one question at a time.

Judge Moldow: Do you feel--

The District Attorney: (interjecting) Yes, I do.

The Presiding Judge: I beg your pardon. Go ahead. Of course, when you ask a question, Mr. District Attorney, and the answer is left up in the air, the Court feels it incumbent to find out what we are talking about.

The District Attorney: I never get--

The Presiding Judge: If you will pardon me, [164] when the witness talks about adults, we would like to know what he means by an adult.

The District Attorney: I think I would like to know, too, and I can ask that.

The Presiding Judge: All right, you ask him.

The District Attorney: I will.

Q. What do you mean when you say adult? A. I believe the definition, the legal definition in this state is someone over 17 years old. That is good enough for me.

Q. So you would show it to any cross-section of the public? A. Yes, I would. As a matter of fact, I think this is a better sex movie to show to young people say between the ages of 18 and 22, than any other I have seen, because it is the most

realistic and the most benign, as far as its outlook on sex is concerned.

Q. Without that act of intercourse, do you think this movie would have had--would have portrayed the theme that you say it portrayed, if it didn't have any act of intercourse?

[165] The Defendant's Counsel: Your Honor, I object.

The Presiding Judge: Yes, it is sustained.

Q. Well, was this act of intercourse, was it the culmination of the solution, right to the problem? A. Not--the relationship was the solution, not the intercourse. The intercourse was part of the relationship.

The Presiding Judge: What was the relationship?

The Witness: I think it was a very close, affectionate relationship, there was a great deal of irony on the surface of that relationship.

The Presiding Judge: Were they married?

The Witness: No, I don't believe they were, no, but I think that intimacy is possible, well, we all know that intimacy is possible without marriage.

Q. You detected a real intimacy between these two people? A. Yes, I think I did, yes.

Q. Did you, at any time, feel that the actor and the actress were sharing this little scene

of intimacy with anyone else as you watched the movie? [166] A. Are you talking about the director?

Q. The Director, for instance? A. Well, it was being filmed, yes, but you know what is on the screen, what we have to talk about is what is on the screen not what happened at the time.

Q. Well, do you think there was a preoccupation as they were looking in this scene, do you think there was a preoccupation at some times in their minds that they were being observed by someone, maybe the director? A. There was evidence that they were aware of the director.

Q. What was the evidence? A. They spoke to the director a couple of times.

Q. When the bell rang, did you hear the bell ring? A. There was a telephone, I believe.

Q. The telephone call, was that for the director, too? A. No, I think there was a telephone--

Q. So that wasn't supposed to be the director, that was just a possibility that there was-- A. (interjecting) I think that was just by chance.

Q. Did anyone else enter that apartment besides [167] the director, that you can surmise? A. I have no idea.

Q. So, in other words, every time their attention was attracted towards-- A. (interjecting) the camera--

Q. (continuing) --towards the camera, only because of the director? A. I have no idea.

The District Attorney: I have no further questions.

The Defendant's Counsel: No questions, Your Honor.

The Presiding Judge: I may have one. The so-called discussion about taxes, war and politics, did that not take a very short time in the film?

The Witness: I am not aware of how much actual chronological time it took. I believe it took--

The Presiding Judge: Oh. Will you excuse me? You will agree there were three reels?

The Witness: Okay, right.

The Presiding Judge: Will you agree to that, [168] that the first reel was about twice the length of the other two reels?

The Witness: I am not aware of that.

The Presiding Judge: You are not aware of that?

The Witness: No.

The Presiding Judge: Now, the so-called discussion of taxes, war and politics, that wasn't really an exchange of ideas between the two people, was it?

The Witness: It was an exchange, not just of ideas, but of feelings they had.

The Presiding Judge: They just spoke about the facts, that the male made certain statements about not voting since Adlai Stevenson's defeat and he wouldn't go to Viet Nam?

The Witness: Right.

The Presiding Judge: And the girls also made a similar statement about Johnson, and somebody, I think, made a statement about Lindsay?

The Witness: Yes, also a discussion about an incident in which he felt harassed.

The Defendant's Counsel: Your Honor, again, [169] I would just ask Your Honor, if you are going to interrogate the witness, which is perfectly all right, please give the witness an opportunity to answer the question.

The Presiding Judge: Counselor, if I may interrupt you, I like an answer to the question, and when I feel that the question has been answered that is it. I do not want him; if I want him to expound further, I will ask him.

The Defendant's Counsel: May I just then, put on the record, Your Honor, at this point, that during the course of the examination of each of the three of the witnesses put on the witness stand, by the defense, there has been more than 75 per cent of the examination, on cross-examination, conducted by the Bench.

The Presiding Judge: Well, you may put it on record. Whether that is a fact, is something else, the record will disclose.

Judge Moldow: We have to take note of the facts, that this is not the ordinary type of criminal case where we have to listen to witnesses [170] who are there, and the Court was not there. The judges all saw this film, and that is what we are talking about.

The Defendant's Counsel: No doubt about it, Your Honor.

The Presiding Judge: And we are trying to get this witness' views on certain things that we observed in the film. When we ask a question, and the witness answers the question, then seems to go on to something else, I think it is proper for the Courts to stop the witness at this point.

Judge Tolleris: I do not think the Court has been cross-examining, merely asking questions for clarification, and information which is relevant to the issues involved.

The Presiding Judge: Would you characterize the statements made by either of the actors in the film, Mr. Phillips, with respect to war, politics and taxes, as a discussion of a subject?

The Witness: Yes.

The Presiding Judge: All right, doesn't discussion imply an exchange of ideas, and views [171] between two people?

The Witness: Yes.

The Presiding Judge: Was there such an exchange?

The Witness: Yes.

The Presiding Judge: Or was there merely a statement that I won't vote or I won't go?

The Witness: I think it was a conversation in the sense that we generally have conversations.

The Presiding Judge: I do not think you have answered my question. There was no exchange of ideas between the people--

The Defendant's Counsel: (interjecting) Objected to, Your Honor.

The Witness: Yes, I believe there was.

The Presiding Judge: All right, what is the objection, Counselor?

The Defendant's Counsel: All right, the answer was given. Let the answer stand.

The Presiding Judge: I did not get the objection.

The Defendant's Counsel: I withdraw the [172] objection, Your Honor.

The Presiding Judge: Thank you. All right. Anything else of this witness?

The District Attorney: I have no further questions.

The Defendant's Counsel: No further questions, Your Honor.

The Presiding Judge: All right, step down.

(Witness excused.)

The Defendant's Counsel: Mr. Heller.

Court Officer Joseph Hughes: Raise your right hand and face the Judge.

Judge Moldow: Do you solemnly swear the testimony you will give will be the truth, the whole truth and nothing but the truth, so help you God?

The Witness: I do.

Judge Moldow: Please be seated.

Court Officer Joseph Hughes: Give your name, address and occupation in a loud voice.

The Witness: My name is Saul Heller, I live at 252 East 61st Street in Manhattan.

[173] The Presiding Judge: Your occupation?

The Witness: My occupation is theatre manager.

SAUL HELLER, the defendant, residing at 252 East 61st Street, New York, New York, occupation theatre manager, having been first duly sworn by Judge Moldow, testified under oath as follows:

Direct Examination by the Defendant's Counsel:

Q. Mr. Heller, have you been a theatre manager at the Andy Warhol Garrick Theatre for a period of almost two years? A. Yes, I have.

Q. Were you the theatre manager since the Andy Warhol Garrick Theatre opened? A. Yes, I have been.

Q. Now, Mr. Heller, will you tell us your background prior to your becoming a theatre manager at the Andy Warhol Garrick Theatre? A. In the past seven, eight years, I have been with Consolidated Theatres of Connecticut, and the Fox Eastern Theatres who came into the east not too long ago, and for [174] a short period of time they brought me back to Manhattan. I was the manager of the Cue Theatre

Ticket Club. Since then I have been manager of the Garrick Theatre.

Q. Have you been a theatre manager during that period of time in various theatres, physically present at the theatre? A. In other--in all the theatres?

Q. Yes. A. In all the theatres, I have been physically present.

Q. Have you ever been connected, Mr. Heller, with any crime? A. I have not.

Q. Have you ever been arrested? A. No, I haven't.

Q. Now, you are the theatre manager at this theatre, is that correct? A. Yes.

Q. Are there any signs in the lobby of this theatre, when you enter the theatre with regard to anything? A. Well, when you enter the theatre, there is a very small lobby in the Garrick Theatre, and immediately [175] to your right, not more than five feet into the theatre, is the box office. It is a normal box office, with a window with a cut in the glass, and there are three signs about--my guess is seven by nine in size.

The Presiding Judge: Inches?
The Witness: Inches, yes, sir.

A. (continuing) One is a schedule, one is a price, and the third one has a big X, white lettering

on a black background, and it says no one under 17 admitted.

Q. Are there any other signs in the lobby? A. There is another sign, other than the usual no smoking signs required by the Fire Department, there is a sign that is about 16 by 32 inches, and that is red lettering, a white background, and that is also required by the Fire Department, and says that the legal seating capacity is 299.

Q. The house is a 299 seat house? A. Yes, 299.

Q. Now, Mr. Heller, do you hire all the employees at the theatre? A. I didn't hear you.

[176] Q. Do you hire all of the employees at the theatre? A. Yes, I do.

Q. When you hire the employees, do you give them any instructions with regard to the operation of the theatre? A. The instructions, I take it you mean have to do with the selling of tickets and to whom we sell the tickets?

Q. What employees do you have? A. And we sell--

Q. What Mr. Heller? A. And the instructions are--

Q. (interjecting) Mr. Heller, what instructions do you have at the theatre? A. We have cashiers who are permanent, and we have others

who are temporary. When I say temporary, I mean an usher, maybe a substitute cashier, when necessary. These people are instructed, that if anyone is obviously under 18 years of age, that we demand identification, and the kind of identification would be a driver's license, a draft card, something that would actually tell the age. The reason for the usher having that, is because if somebody should buy the tickets and then try to come in with [177] someone younger, they are stopped. This may be someone the cashier didn't see, and we will not allow, even if an adult says "well, he is with me, and he is my child," or something like that, we still do not allow anyone under 18.

Q. Now, Mr. Heller, what time do you go to work in the morning? A. I am there regardless of the opening of the picture, I am there at 10:30 in the morning, I leave around 2:30 or three in the afternoon, I come back between six and seven, and I am there until midnight.

Q. How many days a week do you do that? A. Seven days with the exception of the four days that I took not too long ago when I went to Florida to visit one of my daughters.

Q. Now, Mr. Heller, prior to the opening of this picture at the Andy Warhol Garrick Theatre, are you aware of the fact that this picture played at another theatre outside the State of New York? A. To my understanding, it played the Repertory Theatre in San Francisco without incident.

Q. Do you know that it played there seven days? [178] A. Yes, it did.

Q. Now, Mr. Heller, if this picture had been declared by any judicial tribunal in the State of New York to have been obscene, would you have played this picture at the Garrick Theatre?

The District Attorney: Objection.

The Presiding Judge: Well, we will allow it. Overruled.

The District Attorney: Well, the form of the question, Your Honor.

The Presiding Judge: We will allow it.

The Defendant's Counsel: Answer the question.

A. No, I wouldn't.

Q. If this picture had been declared by any judicial tribunal outside the State of New York to have been obscene, would you have played this picture at the theatre?

The District Attorney: Your Honor, I renew my objection. It is a hypothetical question, a leading question. This defendant is not an expert, I see no grounds for that question.

The Presiding Judge: Overruled.

[179] The Defendant's Counsel: Answer the question.

A. I would not.

The Defendant's Counsel: No further questions, Your Honor.

The Presiding Judge: Any cross?

The District Attorney: Yes.

Cross Examination by the Defendant's Counsel:

Q. Mr. Heller, prior to being shown in Court, I presume you had seen this movie before, A Blue Movie, is that correct? A. Yes.

Q. You had an usher that checks people as they come in after they purchased a ticket from the cashier, is that correct? A. Yes.

Q. At every performance, is there an usher there? A. No, but I am there.

Q. So either you or your usher are there? A. Yes.

Q. Watching every person that goes into that theatre? A. Right.

[180] Q. How many different cashiers have you had in the past six months? A. In the past six months?

Q. Yes. A. I will have to give an approximation because they change.

Q. All right, how often do they change? A. Quite often.

Q. How many? A. Ten.

Q. You said they are instructed to allow no one in the theatre who is under 18, you said? A. Right.

Q. And the sign says under 17, is that correct? A. Seventeen happens to be the legal age to my understanding, that is the legal age in New York.

Q. That is what the sign says? A. That's right, the sign says 17, posters say 17, everybody uses 17. However, I did arbitrarily set 18.

The District Attorney: I see. I have no further questions.

The Presiding Judge: All right, step down.

[181] Judge Moldow: You may step down, sir.

(Witness excused.)

The Presiding Judge: Any other witnesses?

The Defendant's Counsel: None, Your Honor.

The Presiding Judge: That the defendant's case?

The Defendant's Counsel: That is the defendant's case, Your Honor.

The Presiding Judge: The People rest?

The District Attorney; The People rest.

The Presiding Judge: Both sides rest.

The Defendant's Counsel: Ready for motions, Your Honor?

The Presiding Judge: Yes.

The Defendant's Counsel: Give me about 10 seconds, Judge, to shuffle some papers. Ready, Your Honor.

The Presiding Judge: Yes, Counsel?

The Defendant's Counsel: Oh, I am ready, Your Honor. I am sorry.

The Presiding Judge: We are awaiting.

The Defendant's Counsel: All right.

[182] I know that this Court is keenly aware of thé changing social values, and that there has been a dramatic change in the social climate as has been exhibited in various and sundry mass media, and in particular, movies, and I call the attention of this Court to such movies that are currently playing, as Alice's Restaurant and Easy Rider.

I am also aware, after having read some of the opinions of this Court, and after having listened to all of the judges here, that they are keenly aware of the obscenity laws as they exist in both the federal and state courts.

However, each of us, whether it be judge or lawyer, must have, whether inborn or conditioned, certain prejudices, whether they be puritanical or libertarian, which must enter into their determination.

I would ask each of you, in making your determination in this case, not only exclude whatever your bias or prejudice may be, but also exclude, if possible, the fabric of motion [183] picture which must be also inextricably interwoven in your mind in making the determination and make it on the facts as exist in this particular case.

That background in mind, Your Honors, I would like to, I think as Mr. Al Smith said, before I was born, "Let's take a

look at what transpired in this case."

The Presiding Judge: Is that what he said?

The Defendant's Counsel: No, "Let's look at the record."

The Presiding Judge: If he did, you have a very good memory, but go ahead.

The Defendant's Counsel: Not that good, Your Honor.

We had in this case, at best, from the People, a judge of this court view a film based upon a verbal communication from a district attorney and at the situs of the film, issue a search warrant and several John Doe arrest warrants.

[184] That judge upon cross-examination, was not permitted to go into the criteria for making his determination.

We then had a deputy inspector testify that he had viewed this motion picture two days beforehand with several other witnesses, the district attorney had originally communicated with the judge, and he accompanied the Judge to the viewing of this motion picture, and then the judge issued these papers, to wit, the search warrant and the arrest warrant, and that he thereafter signed a formal complaint in this case.

We then viewed the motion picture.

There was not a scintilla of evidence introduced to controvert any of the standards set forth in Roth, in Redrup or in Stanley.

Motions made at the end of the People's case by myself were then denied.

The defendant then put on the stand, and I must say this, as Mr. Mike Nichols has said many times, people see in motion pictures what [185] they want to see in them. Nobody is an expert.

We then put on the stand a recognized expert, by the name of Parker Tyler, whose book has been submitted into evidence, and this Court's recollection of Mr. Tyler's testimony, and the reading of the paragraph in his book which came out prior to any seizure in this particular case, or I may have talked to him is the best recollection of Mr. Tyler.

We then had on the stand, Dr. Charles Winick, who ad nauseam went into his qualifications in his field, and testified to the redeeming social value. At one point, I think Judge Moldow asked him how old he was, and he said 47, and maybe he didn't speak for the younger people but he certainly had an opinion as to the redeeming social value, and he is an accredited sociologist, and an accredited movie expert.

We then had a young man of the age of 27 who was also a film critic, testify here this morning, and that gentleman's testimony is best [186] known to each of Your Honors.

Finally, we had the defendant testify in this case that he has no prior criminal record, he was not aware of any obscenity, had he been aware of obscenity he certainly would not have played the picture, and at the same time he testified to the effective modus operandi that he employs in running the theatre.

That is the whole case. There has been no rebuttal witnesses, there have been no witnesses from the People in rebuttal to shatter any of the views of any of these people. Whether they are right or wrong, they have a right to make these views, they are accredited people.

Now, Your Honor, at this point, I would like to get to the law.

I think that the first point I would like to make, because I had almost forgotten it, is that we are in a criminal trial, and knowledge is an essential ingredient in order to find this defendant guilty.

Further, the burden of proof is upon the [187] People on each and every element of the crime. It may be, as has not been demonstrated here today, that this defendant had to even come forward to refute the burden of proof. The People have proved absolutely nothing in this case.

Now, I would like to get to the pertinent law as I understand it in this type of obscenity trial. I think that there are two specific points, to wit, the procedural aspects of due process in an obscenity trial.

Yesterday it was my contention, and it is my contention today, that four federal circuits have held that there must be an adversary determination, a prior adversary determination in an obscenity case, and for the record I am going to cite Metzger versus Pearcy, 393 Federal 2nd 202 7th Circuit; Cabist Films, Inc. versus Illinois, 292 Federal Supplement, Northern Illinois; Natali versus--

Judge Moldow: Give the page on that one.

The Defendant's Counsel: I only have the [188] index number, 111, 1968. I am going to hand up to the Court, by the way, Judge McLean's opinion in a moment.

The Presiding Judge: You mean in the--

The Defendant's Counsel: Right, I am going to get--

The Presiding Judge: (continuing)--in the 208 case?

The Defendant's Counsel: Yes, in the 208 case, right, and we have the case of Natali versus The Municipal Court of the City and County of San Francisco, decided by U.S. Judge Zirpoli, index number 50737 1969.

However, as Judge Ringel pointed out yesterday, Judge McLean in a decision in the United States District Court, in the case of 208 Cinema, Inc. versus Vergari, 69 Civil 1747, on page 14 says, and I quote from his opinion,

"This conclusion," and he is speaking about the conclusion he reaches, "is contrary to that reached by the Seventh Circuit in Metzger and in a district court decision in that circuit, [189] Cambist Films, Inc. versus Illinois. In my opinion those decisions placed undue emphasis upon the language rather than the actual holding of a Quantity of Books. Those decisions are not binding upon me and I decline to follow them."

I hold contrary to Judge McLean. However, as I stated yesterday, right in the heart of Judge McLean's opinion, on pages 12 and 13, we find the following language,

"Instead of the unsupported conclusory affidavit of a police officer, we have, one, detailed factual affidavits of an assistant district attorney, two, personal observation by a judge of the very films that were seized."

If this Court wants to only hang its coat on two, that is its prerogative. I say they do not have a right to do that.

And then, I will hand up for the benefit of the Court, the opinion, and I am sorry it is not a good Xerox of Judge McLean's opinion.

The Presiding Judge: All right.

The Defendant's Counsel: Now, Judge [190] McLean's opinion was fulcrumed upon upon substantial supporting affidavits.

Deputy Inspector Smyth could have had substantial supporting affidavits between July 29th, and July 31st. He didn't.

Judge Moldow: What would that have added to Judge Goldberg's observation of the film itself?

The Defendant's Counsel: It would have mattered, there would have to be probable cause for him to go there.

Judge Moldow: You mean he did not have the right to go there in the course of his official duties without having what you consider to be probable cause to even do it?

The Defendant's Counsel: That's right. If I asked Your Honor to go there, would Your Honor go to see a film and make a decision? I am as much a judicial officer as an assistant district attorney.

The Presiding Judge: Well, theoretically.

The Defendant's Counsel: All right. Now, [191] if you want to take the viewpoint, and I myself go one step further, between the 29th and the 31st there were no affidavits, Smyth was here in the courtroom yesterday, he is probably here in the courtroom this morning, nowhere has the District Attorney put into evidence any affidavit, it is an ethereal paper which did not exist as far as I am concerned, and as far as the Court is concerned.

The Presiding Judge: Counsel, I pointed out yesterday, if you want to attack the warrants in this case, and you are doing it by innuendo, at least--

The Defendant's Counsel: (interjecting) No, Judge, I am going to the weight of the evidence.

The Presiding Judge: Who is interrupting whom?

The Defendant's Counsel: I am sorry, Your Honor.

The Presiding Judge: Your remedy, Counselor, would have been a motion to controvert [192] the warrant, and you never made such a motion.

The Defendant's Counsel: Yes.

The Presiding Judge: All right.

The Defendant's Counsel: I say that Judge Goldberg, in this matter, flies in the face of constitutional protections, and on a diminutio basis, assuming Judge McLean is correct, they haven't even followed that procedure here.

Now, as Judge Ringel aptly pointed out yesterday, Article 22 in his opinion--

The Presiding Judge: Article 22a, small a.

The Defendant's Counsel: Yes. In his opinion, and in mine, does not control theatre and film. I think it is incumbent, in order to make the statute constitutional, under which this defendant is being tried, that there be built into that statute an effective procedural modus operandi so that a defendant in a criminal case, such as this, which I admit is unusual, would have the requisite knowledge of scienter that are required to find him guilty in any criminal proceeding. It is [193] impossible for this defendant to have known that that picture was obscene by any stretch of the imagination.

Now, with regard to the verbal communications of the District Attorney, and the Judge in this matter, I find no--

The Presiding Judge: You mean Judge Goldberg?

The Defendant's Counsel: Judge Goldberg.

The Presiding Judge: Yes.

The Defendant's Counsel: There is no doubt that there is no harm in means of judicially communicating with lawyers. Howevery, in this particular type of case, socializing may be fine on an innocuous matter, but when it comes to a medium for an ex parte addressed to the Court on a highly sensitive and important aspect of a pending

case, and this is a pending case no matter how it may be construed, without the knowledge or consent of the adversary, then it is so gross in error, that irrespective of other circumstances, it would require reversal.

[194] A defendant whose liberty and future are at stake is guaranteed the right to be present at all important stages of a trial, and I am only going to cite the Criminal Code, Section 356.

"Any sort of ex parte procedure which denies this right, violates the defendant's guarantee of a fair trial as well as the statute, the People ex rel Lupo v. Fay 13 New York 2nd 253 People v. Oliver 4 Appellate Division 2nd 28 affirmed New York 3 2nd N.Y. and People versus Insogna 28 Appellate Division 2nd 771, 3rd Dept., also Canons of Professional Ethics 3 and 5."

Now, at this point, I would like to digress as to the substantive aspect of the case. I think that we have the Roth doctrine which was amplified on Redrup versus New York, which sets forth the standard under which the film such as this may be deemed obscene, and as I recognize it, you must have the dominant theme of the material taken as a whole, must appeal to prurient interests in sex and the film must be patently offensive because it affronts contemporary community standards in its [195] representation and description of sexual matters, and the film is utterly without redeeming social value.

And that decision by the latest pronouncement of the United States Supreme Court in which Mr. Justice Marshal wrote--one second--

The Presiding Judge: Stanley versus--

The Defendant's Counsel: I know it is Stanley versus--

The Presiding Judge: Oh.

The Defendant's Counsel: In the case of Stanley versus Georgia, we find the following, the Supreme Court condemns the Georgia statute there as amounting to "the assertion that the State has the right to control the moral content of a person's thoughts."

The Court went on to explain, and I am now quoting from Stanley versus Georgia.

"To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. As the Court said in Kingsly International Books Corp. v. Regents, 360 U.S. 648, 688-689... 'this argument misconceives what it is that the Constitution protects. Its guarantee is [196] not confined to the expression of ideas that are conventional or shared by a majority... and in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.'"

The Court then continued to rule:

"Nor is it relevant that obscenity in general, or the particular films before the Court are arguably devoid of any ideological contents. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if in-

deed such a line can be drawn at all. See Winters v. New York, supra, 333 U.S. at 510..."

Finally in Stanley v. Georgia, supra, the Supreme Court explained,

"Whatever the power of the State to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thought, and the right to possession such material presupposes the right to acquire it as well."

Now, if that be the most recent pronouncement [197] of the United States Supreme Court, and if we take the facts as adduced here before this Court, let us see what the facts were with regard to that.

We have established that the film was not available for children under the age of 17.

Mr. Heller has testified that they had to be 18 to get in. There has been no evidence contrary to that in this entire case.

We have no demonstrable harm being performed here in that we are not foistering this film upon the people here or anyone else to have to pay to get in, we are not showing film on 42nd Street in the open public.

We have no widespread distribution of the material here as was set forth in the famous Roth case, Ginsburg case in pandering. We have no intrusion upon the rights and sensibilities of private general public as in Ginsburg. We have no unconventional sexual activity in this film, and with due respect to Judge Moldow, I have not yet seen one

film on 42nd Street where there is [198] unconventional sexual activity such as masochism, sado-masochism, lesbianism or whatever you wanted to have found obscene in this courtroom.

We have no evidence adduced by the People controverting any of the defendant's statements, and we do have the testimony from three defenses, from three witnesses, one 27 years of age, and not 47 as was Mr. Winick, he found it to be of social value, and we don't have to conduct a seminar; he found it, Judge Winick, excuse me, Dr. Winick, found it, I am sorry, and in addition, Parker Tyler found it. Now these three men were not contradicted by anyone.

Now, in the last argument, Your Honor, this is supposed to be a crime. McLean's decision, Your Honor, was in a civil case. I am Curious Yellow was in a civil case. U.S. versus 1 Carton, which I tried in the Federal Court was a civil case.

And all three cases, we were not dealing with scienter. We have no possibility of this defendant, nor have the People introduced anything [199] knowing that he committed a crime. The picture played openly, notoriously to the general public seven days in San Francisco, and there was never any adverse determination, to the best of my knowledge, with regard to this picture in any jurisdiction in the United States.

Now, Your Honors, in closing, I would like to call the attention of this Court to

what I believe Your Honor alluded to yesterday, and that is in its anaylsis of the work of the Warren Court, the New York Times Magazine of September 7, 1969, page 99, in an article written by Professor Bishop of Yale concludes, "I don't think obscenity remains undefined, the upshot is that nine generally sedate lawyers have spent an inordinate amount of time reading books, and watching movies, that would bring a blush to the cheek of an editor of Grove Press."

It is respectfully submitted, Your Honors, and this may be my view, I know we are in a criminal court, that whatever obscenity is, it is [200] immeasurable as a crime, and delineable only as a sin, and as a sin, it is present only in the minds of some and not in the minds of others. It is entirely too subjective for legal sanction.

The District Attorney: Your Honors, I think the question of the procedural aspect of the search warrant was decided yesterday. I will repeat, however, again, the procedure followed in this case was the same procedure we have followed in every obscenity case, that is, an affidavit was presented to an officer of the court who viewed the obscene material or the material in question. In this case, there was verbal communication between the District Attorney and the Judge, because arrangements had to be made, it wasn't a question of going in to a judge in his chambers and presenting him with newspapers and an affidavit. The judge had

to consent to his time schedule, to leave the court and go down and actually see the subject of the pending prosecution.

The procedure we used was absolutely no [201] different from any other procedure we use.

The question of adversary determination has been decided in the Rage Book vs Commissioner of Police of the City of New York, and the question has been decided that non-adversary determination in obscenity proceedings is well within the law, and the defendant is not being deprived of his rights.

I might also point out that if the question being determined at this non-adversary determination or ex parte proceeding is obscenity, it is that very question that this Court is deciding on in this trial. This defendant has not been deprived of any of his rights.

Secondly, the defense counsel alludes to defendant's lack of knowledge of the crime, but I think that is totally dismissible as far as argument. To my mind, there is a presumption in the New York State Penal Law that says anyone that promotes, sells or produces obscene material is presumed to have knowledge of its content.

Now, we have had testimony from this defendant [202] that he has been in the movie business for a long time, he is managing a theatre. Besides this presumption, we can also rest assured that I think this defendant knew that he wasn't showing Mary Poppins up there in that

theatre, and this movie was something different. I don't think the Court has to stretch its imagination to presume that this defendant did have knowledge of the obscene material of this production.

Thirdly, of the defense's contention that the People did not provide any witnesses, contrary to the testimony, the ex parte testimony presented by the defense, I think the cases here again well hold that the People did not have to produce witnesses testifying to the socially redeeming value, or whether this movie is or is not appealing to the prurient interest, or whether it is offensive to the community's moral standards.

In this case, the prime piece of evidence that has been presented by the People of the State of New York is the movie itself. The Court [203] has seen this movie. Counsel in his closing argument elludes to the fact that nine justices had to sit and look at books that would cause an editor of Grove Publications to blush. However, it is a fact that the People who can decide this issue of obscenity are the judges themselves. They are as much a part of the community as anyone else. If I were to put five witnesses up there, saying that this movie has no redeeming social value, that it appeals to the prurient interest, that it is offensive to the community's social patterns or standards, it wouldn't make any difference because the biggest piece of evi-

dence in this case for the People is the movie itself, and the judges have all seen this movie.

I think as far as the expert testimony, I don't think this is an I Am Curious Yellow type of situation in this movie. In I Am Curious Yellow we had 13 people testify to the redeeming value, the theme of the movie, what the talk was about. Some of them were alike, some different. [204] Here we had three expert witnesses, one of whom, Mr. Tyler, states that the dialogue means nothing. In his words, it is the cool world's approach to sex, or the cool world's approach to the problems, but the dialogue means nothing. He stated, in cross-examination, that if they talked about subjects completely different, it wouldn't have made any difference.

The second witness, Dr. Winick, also admits that for the most part the dialogue means nothing. He saw the redeeming value in the acts themselves, the realistic portrayal of the sexual act, that was the redeeming value that he saw. There was no redeeming value outside of these acts or a plot line or story or even a theme. The redeeming value was the act, the real act of intercourse, that is what he saw as its redeeming value.

The third witness, of course, makes a complete turnabout, and to him the dialogue is very important. Even though he admitted in many cases he didn't even hear the dialogue, he also admitted upon cross-examina-

tion that the dialogue only [205] took up less than about a third of the movie, the dialogue had related to political and social discussion and theory.

I think we have a conflict here as to what the theme is of this movie. The defense's own expert witnesses are very confused as to what the social redeeming value is.

I think, finally, defense counsel's reference to Stanley versus Georgia, and reading from that opinion, expresses a situation that is so far different from the case before us, that I don't even think it is worth alluding to. However, just so there be no mistake, that Stanley versus Georgia applies to obscene films found in a person's home, there is no question that this movie theatre is a public place. People paid to go in but it is still a public place, it is a public theatre that is licensed by the City. It is not a private home. I think the defense, counsel's contention that people underage were not allowed into the theatre, to me has no impact, has absolutely nothing to do with the issue here [206] today. The crime we are discussing, is not a sale to a minor of obscene material, the crime that we are talking about is 235.05 of the Penal Law which has nothing to do with age.

I think, in conclusion, the People have more than sustained their burden of proving a case of obscenity by the mere showing of this film to the Court.

The Defendant's Counsel: May I just add one sentence, Your Honor?

The Presiding Judge: Yes.

The Defendant's Counsel: If it is possible.

First, as I understand this type of case, if there is an iota of redeeming social value, in the decisions, and that iota stands, that is sufficient to overcome anything that has been proposed by the People.

Number two, I am not sure, and I don't know whether the Courts are sure whether the People must prove this case beyond a reasonable doubt, or in this type of situation to a moral [207] certainty, and I would just add those two points.

The Presiding Judge: Well, this being a criminal prosecution, I think the law is clear that the People must establish the guilt of the defendant beyond a reasonable doubt. Is there any question about that?

Judge Moldow: No question.

The Presiding Judge: This is not a civil proceeding. With respect to the scienter, on the part of the defendant, how would you interpret the defendant's instructions for his staff, "Don't let anybody in under 18," wouldn't that be indicative of some knowledge on his part of the nature of the film?

The Defendant's Counsel: Absolutely not, Your Honor.

The Presiding Judge: Absolutely not?

The Defendant's Counsel: Absolutely not, because in practically every theatre in the City of New York where you have an X sign or restricted sign, the same things prevail, where the theatre managers tell their ushers and cashiers that they [208]

cannot let people into the theatre under the age of 17, and I don't think those Columbia Pictures people are being prosecuted here or anyone, it just happened we had four pictures at that theatre, all Andy Warhol pictures--

Judge Moldow: I don't think that is appropriate argument. That question just occurred to me and I might also call your attention to the opinion of Mr. Justice Frankfurter in Smith versus California in which he said the defendant cannot insulate himself from obvious matters of knowledge.

The Defendant's Counsel: He was doing better than that, he was self-regulating the theatre in conformity with the laws of the State of New York.

The Presiding Judge: Who?

The Defendant's Counsel: This theatre. The laws of the State of New York say you should not let a person under the age of 17 come into the theatre, yet he was making certain of that. There is a restriction, an X rating under the code.

[209] The Presiding Judge: You mean I can't take my grandchild to a movie in New York?

The Defendant's Counsel: There are certain ratings, Your Honor, which one--

The Presiding Judge: Certain ratings. Wouldn't that factor that he put an X rating up or saw the X rating, wouldn't that put him on some notice to look out?

The Defendant's Counsel: There are over 400 pictures with X ratings, Your Honor.

The Presiding Judge: Well, all right. All right, we will consider your motion.

The Defendant's Counsel: Thank you, Your Honor.

The Presiding Judge: I just want to say one thing. This is not a prosecution for obscenity distributed to a minor.

The Defendant's Counsel: Absolutely not.

The Presiding Judge: All right, you were arguing that as another section of the Code of the Penal Law.

The Defendant's Counsel: Understood, [210] Your Honor.

The Presiding Judge: All right.

(Whereupon the Court conferred in their Chambers.)

(Court returns from Chambers.)

The Presiding Judge: We have listened with great interest to the testimony, and the very able argument by counsel on both sides.

It is the conclusion of the Court that the motion to dismiss is denied, that the defendant is found guilty.

We would like to call to your attention, that with respect to the due process clause violation urged by Counsel, that there was a judicial scrutiny by a judge of this Court prior to the issuance of the warrants, and I refer you to Marcus versus Search Warrant in the United States Supreme Court.

With respect to the absence of adversary proceeding as provided in the Code of Criminal Procedure, Section 22a, I think we are in agreement, Counsel has indicated there is

no [211] provision for an adversary proceeding under that section with respect to motion picture films.

We find that the motion picture in question is hard core pornography, see People versus Richmond County News New York 9 2nd 578. Hard core pornography is obscene by any standard, see Womack versus United States 294 F 2nd at pages 204 and 206. Sexual activity between male and females graphically portrayed absent any social justification or excuse is obscene. See the decision in People versus G.I. Distributors at 20 New York 2nd 104, under the test for obscene which modifies the Roth decision alluded to by Counsel, we have the case of Memoirs versus Massachusetts commonly called the Fanny Hill case at 383 U.S. 413, and as far as the matter there, in issue, one of the tests that are in issue here is whether the work and material in question has redeeming social value. That statement in the Memoirs case, the Fanny Hill case, is that the work in question must be utterly without redeeming and emphasizing redeeming, redeeming social value. [212] The expert testimony in this case presented by the defendant is not persuasive.

All right, what date for sentence, Counselor?

The Defendant's Counsel: The Court is ready, Your Honor, tomorrow morning?

The Presiding Judge: Well, we need the fingerprint record.

The Defendant's Counsel: I think he has been fingerprinted, Your Honor. Do we have a print on him? If there is no objection, we have no objection to proceeding to sentence.

The District Attorney: There is no objection.

The Presiding Judge: No prior record?

The District Attorney: He has no prior record.

The Presiding Judge: All right. He has no prior record. You are waiving the two days' notice?

The Defendant's Counsel: Absolutely, Your Honor.

The Presiding Judge: Is there any--

[213] Judge Moldow: May your client stand, please?

The Defendant's Counsel: Yes, I am sorry.

The Presiding Judge: If you are ready for sentence, there is no legal cause why sentence should not be now imposed by the Court, the Court will be ready to hear what you or your client or both have to say in mitigation of sentence.

The Defendant's Counsel: Well, there is no reasonable cause why sentence should not be imposed, and with regard to that, what I or my client have to say with regard to sentence, the Court has heard for two days, all of the testimony in this matter, and I don't think that there is anything that I could say or my client could say that would

aid or abet the Court, save the fact that this man for 66 years has never been arrested for anything in his life.

The Presiding Judge: What is his connection with the theatre? Does he have any [214] connection other than as a manager?

The Defendant's Counsel: No.

The Presiding Judge: Does he own any stock?

The Defendant's Counsel: He does not own any stock.

The Presiding Judge: Does he have anything to do--

The Defendant's Counsel: He is an employee.

The Presiding Judge: What is his salary?

The Defendant's Counsel: It is $175 a week.

The Presiding Judge: All right.

Judge Moldow: Does your client wish to say anything in his own behalf?

The Defendant's Counsel: Mr. Heller, would you like to say something?

The Defendant: I am too much in shock to say anything, with the pictures that I have seen and the ways they are presented here and under the circumstances, people in the amusement industry and [215] the members of the public all find their own level as far as amusement is concerned. I doubt that anybody who purchased a ticket for this picture was harmed in any way, shape or manner by viewing this picture. I saw other pictures, that this was a kiddy matinee to what is playing in some of the other theatres.

I am too shocked, I am not going to ask Your Honor for any clemency at all, I have a little too much pride for that.

(Court confers at Bench.)

The Presiding Judge: The Court is taking into consideration the defendant's age, his prior good record, and the fact that he is no more apparently than an employee of a theatre which shows pictures in which he happens to be the manager.

Had a more closer connection been indicated, and do you have any information on that, anything else on that, on the closer connection other than the fact that he is a mere employee?

The District Attorney: No, Your Honor.

[216] The Presiding Judge: Had a closer connection been indicated, the Court would have taken a very severe view of the defendant's actions in this case.

Under the circumstances, the fine is $250 or 30 days.

The Defendant's Counsel: Your Honor, give me until some time--

The Presiding Judge: One week enough?

The Defendant's Counsel: One week is fine, Your Honor.

The Presiding Judge: All right.

The Defendant's Counsel: Thank you, Your Honor.

The Presiding Judge: You are welcome. Step over on the side, please. September 24th to pay.

(Whereupon another case was called and disposed of).

(Later)

The Defendant's Counsel: The defendant will pay the fine of $250 and I ask that the film [217] be held by the Police Department in the same condition as it is in now pending an appeal. I do not want the film confiscated.

The Presiding Judge: I have no control over what the Police Department will do or what the process here is. What is your standard operating procedure?

The District Attorney: Your Honor, the film is retained by the Property Clerk. I believe if there is an appeal being taken the film will not be touched. It will be held in the Property Clerk's office.

The Presiding Judge: You have 30 days to file an appeal.

The Defendant's Counsel: It will be made within a week.

The Presiding Judge: All right, we will hold the exhibit in the court, in the custody of the court. Now, is there any objection, counselor, if the District Attorney takes the film and keeps it in their--

The Defendant's Counsel: Absolutely not.

[218] The Presiding Judge: In their room and gives you a receipt for it?

The Defendant's Counsel: Absolutely not.

The Presiding Judge: All right, thank you.

Judge Moldow: And also a book involved.

The Presiding Judge: All right.

Court Officer Joseph Hughes: He has the book.

The Presiding Judge: We read that chapter.

The Defendant's Counsel: I read it myself.

The Presiding Judge: All right, you did a good job, Counselor. Sorry we don't agree with you.

Certified to be a true and correct transcript of minutes taken in the above proceedings.

s/ Jerome Oppenheimer, CSR
JEROME OPPENHEIMER, CSR
Official Court Reporter

Colloquy

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK PART 2B3

- -

PEOPLE OF THE STATE OF NEW YORK,

Complainant,

-against-

SOL HELLER,

Defendant.

- -

DOCKET NO. B19858

100 Centre Street,
New York, N.Y. 10013
October 27, 1969

BEFORE:

HON. WILLIAM E. RINGEL, Justice,
HON. MORTON TOLLERIS, Justice,
HON. BERNARD MOLDOW, Justice.

APPEARANCES:

FRANK S. HOGAN, District Attorney,
For the People,
155 Leonard Street,
New York, N.Y. 10013

Colloquy

BY: RICHARD BECKLER, A.D.A.

JOEL H. WEINBERG, ESQ.,
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New York, N.Y.

COURT REPORTER: George Aaronson
COURT OFFICER: Joseph Hughes

[2] P R O C E E D I N G S

Justice Ringel: This is the case of People versus Sol Heller, et al, Information Number B19858, 1969, Joel H. Weinberg, Attorney for defendant has made a motion.

Mr. Beckler from the D.A.'s office is here representing the People.

We will hear what you have to say, counselor.

Mr. Weinberg: If it please the Court, on September 16th and 17th of this year, before this Court, the case of People versus Heller was tried, and on September 17th this reading from the court record Judge Ringel, at Page 210, stated as follows:

"We have listened with great interest to the testimony and the very able argument by counsel on both sides. It is the conclusion of the court that the motion to dismiss is denied, that the defendant is found guilty."

We would like to call to your attention that with respect to the due process clause violation urged by counsel there was a judicial scrutiny by [3] a judge of this court

prior to the issuance of the warrants, and I refer you to Marcus versus Search Warrant in the U.S. Supreme Court.

On that very day prior to the judges' unanimous opinion, at Page 201 the District Attorney in summing up stated: "The question of adversary determinations has been decided in the Rage Book vs. Commissioner of Police of the City of New York, and the question has been decided that non-adversary determination in obscenity proceedings is well within the law and that the defendant is not being deprived of his rights."

On December 16, 19 -- on December 17th, at Page 187, in my motion to dismiss at the end of the entire case --

Justice Moldow: That's September 17th.

Justice Ringel: September, you mean.

Mr. Weinberg: I'm sorry, your Honor.

Justice Ringel: That's my birthday.

Mr. Weinberg: It was September 17th.

Justice Moldow: Yes.

Mr. Weinberg: My motion to dismiss at Page 187, I stated to the Court, "Yesterday it was [4] my contention and it is my contention today that four Federal Circuits have held that there must be an adversary determination in an obscenity case, and, for the record, I am going to cite "Metzger, et cetera", and cited four cases. I went on for two pages with regard to that.

On September 16th, the day before, I went into the same matter and covered the same grounds.

Colloquy

Now, the reason that I am here today is that it was always this defendant's contention that prior to the film in question being seized by law enforcement officers there had to be a prior adversary proceeding declaring the film obscene in order to be constitutionally valid.

On October 6, 1969, in the case of Bethview Amusement Corporation versus Kahn, a Xerox copy of the entire opinions of Justices Waterman, Hayes and I think, Bartels, was submitted to each of your Honors prior to coming here this morning--

Justice Ringel: Yes, we read it.

Mr. Weinberg: And on October 8th, two days later, the very case upon which, I believe, Judges Moldow and Ringel, relied, to wit, 208 Cinema [5] versus Steinberg was overruled in the Second Circuit by three judges, to wit, Judges Moore, Kaufman and Waterman in open court.

Justice Ringel: Are you referring to the decision you handed us?

Justice Moldow: No, it wasn't in existence at that point when we tried the case.

Mr. Weinberg: That is correct.

Justice Ringel: Do you have a copy of the minutes of that?

Mr. Weinberg: I have a copy of the Clerk's minutes on that. I do not have a copy of--

Justice Ringel: It would be helpful to have it.

Mr. Weinberg: I will give your Honor, I have here--

Justice Ringel: You don't have to give it to us right now. Go on with your argument.

Mr. Weinberg: I do have the document which I affixed to the motion paper, a Xerox copy, of the docket, and if the Court so --

Justice Ringel: Yes, I have it here.

[6] Mr. Weinberg: If the Court so desires, I have one original of the Bethview case.

Now, it is true, your Honor --

Justice Ringel: Excuse me for interrupting. There was not any memorandum of law or anything that the Court handed down on that other than what you have given us here?

Mr. Weinberg: As far as I know, your Honor?

Justice Ringel: Yes.

Mr. Weinberg: May I say this: I was tangentially involved in that case having represented one of the defendants as we went through in the trial of the matter and submitted a protracted memorandum of law, and at the time that we tried this case on September 16th and 17th there is no doubt that Judge McLean had made a determination which this Court had every right to rely on if it so desired. I argued contrary to that determination.

No, as of this date, Judge McLean has been overruled in open court, and the reason we are here today is that I believe we

are discussing [7] fundamental constitutional rights and not obscene or dirty film, we are discussing court procedures and police procedures and not an obscene or dirty film and we are talking about a criminal prosecution and a defendant's liberty.

Justice Moldow: Counselor, I don't want to interrupt your argument, but I have a threshhold question that I'd love to hear your view on.

This case has been concluded and the fine has been paid, final judgment in this case. What authority do we have to set aside our own judgment even if the law changed subsequently?

Mr. Weinberg: You have three points of authority, in my opinion. I say this factually. You have it in the nature of an arrest of judgment which may be argued that I cannot argue it here today, you have it in the inherent right of this Court to decide something on the basis of something justice and you have it in the nature of a quasi form of Corum Nobis proceeding. To be frank with you, I can't hang my hat on any [8] one of these, but you do have something that is very, very important here, and that is this, particularly Judge Moldow -- and I'm referring to you directly when I say this: I think the gravamen of your determination was predicated upon the fact -- and I think I had colloquy with the judge -- to the effect that you had a right to find something obscene by yourself, and I said you didn't.

Colloquy

Now, there can be no clearer ruling than the Second Circuit.

Justice Moldow: Are we still talking about the jurisdictional threshhold?

Mr. Weinberg: Well, the jurisdictional threshhold, your Honor, I have no authority except to state what I said here. I think that rather than -- and I say this in all sincerity as I said it that day -- I didn't buy the record solely for the purpose of looking at it, I'm about to take this up on appeal, but I think there's no necessity for an appeal in that the law is crystal clear throughout the United States at this point, no longer is McLean controlling in any area. [9] McLean has been overruled. The Second Circuit, five judges have said what you need in this type of case, and if I may just --

Justice Moldow: But if we changed our judgment, assuming jurisdiction relying on the case that you're talking about, that would put you and your client in a better position than the case you are relying on, wouldn't it?

Mr. Weinberg: Absolutely, but that's the position you put me in, I didn't put myself in that position in this and I thought about that also, but I'm not the one who created that position. That position was created by a determination of a three-man bench of which your Honor, all three --

Justice Ringel: Relying on what the law was at the time we made the decision, at least.

Colloquy

Mr. Weinberg: Agreed, to this extent. It was not the law at the time you made the decision, it was on a lower court's law at the time you made a decision. Every circuit court in the United States had a ruling contrary to the ruling --

Justice Ringel: Every circuit court?

Mr. Weinberg: To the best of my knowledge.

[10] Justice Ringel: I only know of the Seventh Circuit, that's the Metzger case which was in Indiana -- I don't know what circuit that was in -- and you had one down in the Fourth Circuit in the Tyrone Wilkinson case.

Mr. Weinberg: Be that as it may, it's my contention at this time whether or not there is a threshhold answer to the question proposed by Judge Moldow, I maintain in the interests of substantial justice in a criminal prosecution where beyond cavil all of the courts in all of the circuits as of this date have held that you must have a prior adversary determination of obscenity in order to declare a film obscene and the very language of the United States Court of Appeals in Bethview Amusement Corp. versus Kahn on Page 3555 to wit, "The only issues raised is whether the protection required by the First Amendment required that appellees be given an opportunity to be heard on the issue of obscenity before the film could be seized by the police.

"We hold that the First Amendment as applied to the states by the 14th requires and adversary [11] hearing in such a case."

Colloquy

I maintain as of this date, in the interests of substantial justice, that this court reverse its judgment of conviction on the law as it now exists, acquit the defendant and remit the fine.

Mr. Beckler: Your Honor, the People have only two main points to wager on this argument for reversal of conviction by this bench. The first is that motions to suppress the evidence in this case were waived by this defense counsel. We brought this case immediately to trial. Were this court to reverse the conviction and People would therefore have no remedy in that we would get into a problem of double jeopardy, there is no motion that could be decided from which the People could appeal, there is only a reversal of conviction on trial which would leave us no ground to appeal. It is on that ground that the People would oppose this motion for reversal of conviction.

The second course we would ask this Court to follow is not follow the decision of the Second Circuit Court in that this law is still in a state of confusion. The cases which have been enumerated [12] by defense counsel, Metzger for one, Metzger is a case in which four different rulings were made as to the non-obscenity of this movie when a court in Indiana or a police prosecutor in Indiana decided to go ahead and prosecute this movie and seized it. This is a far different circumstance than the case before us today, the Heller case. This case is still in a state of confusion and this Court should not follow the Second Circuit opinion.

Colloquy

On that ground and also that the motion to suppress was waived in the beginning before trial started on this matter, the People feel that this conviction should not be reversed.

Justice Ringel: We will reserve decision on the motion, Mr. Weinberg, and we will have to adjourn it for a week or two anyhow.

Let us say two weeks, gentlemen.

Mr. Weinberg: May I ask this question: Must I again appear, your Honor, on this?

Justice Ringel: Not unless you desire.

Mr. Weinberg: I didn't mean it facetiously. I don't know what you mean by adjournment.

[13] Justice Ringel: We're going to reserve decision on your motion, make a decision within two weeks.

Mr. Weinberg: Fine, no problem.

Thank you, your Honor.

Justice Ringel: Two weeks from today is?

The Bridgeman: November 10th.

(Presiding Justice Ringel, also Justices Moldow and Tolleris)

I hereby certify that the above is a true and correct transcript of the proceedings in the above-entitled matter.

s/ George Aaronson
George Aaronson

Court Reporter

Decision

CRIMINAL COURT OF THE CITY OF NEW YORK
PART2B-3 : COUNTY OF NEW YORK

- -

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

SAUL HELLER, SUSAN EPSTEIN and
MARK KERN,

Defendants.

- -

Dockets: B—19858
B—19859
B—19860

Charge: 235.05

Criminal Courts Building
100 Centre Street
New York, New York
November 10, 1969

BEFORE:

HONORABLE WILLIAM E. RINGEL,
Presiding Judge.

HONORABLE MORTON TOLLERIS,

HONORABLE BERNARD MOLDOW

Decision

APPEARANCES:

FRANK S. HOGAN, ESQ.
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BY: JERRY HINCKLEY, ESQ. of Counsel

JOEL F. WEINBERG, ESQ.
Atty for the Defendants
1465 Broadway
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ANTHONY TRIMBOLI,
Court Officer.

IRA DICKSTEIN,
Court Reporter.

[2] Court Officer: Dockets B-19858 through 60 Saul Heller, Susan Epstein and Mark Kern, charged with 235.05 of the Penal Law.

Judge Ringel: Yes, Mr. Weinberg.

Mr. Weinberg: Ready for the decision.

Judge Ringel: We have read your motion papers and given the matter a great deal of thought and consideration. This Court feels it is without power to grant the motion. The remedy, if any, lies within an appellate court. The motion is therefore is denied.

Mr. Weinberg: Thank you, your Honor.

Certified to be a true
and accurate transcript.

s/ Ira Dickstein,
Ira Dickstein,
Court Reporter.

Stipulation Dispensing With Reproducing of Exhibits and Minutes of Adjournment

SUPEME COURT OF THE STATE OF NEW YORK
APPELLATE TERM: FIRST DEPARTMENT

- -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

SAUL HELLER

Defendant-Appellant.

- -

IT IS HEREBY STIPULATED AND AGREED by and between the attorney for the Defendant-Appellant and the attorney for the Respondent, that the appeal in the above entitled action shall be limited to the proceedings had on trial and at sentence.

IT IS FURTHER STIPULATED AND AGREED that the arraignment and adjournment minutes need not be reproduced since no error is assigned thereto by Defendant-Appellant except that if the District Attorney determines these minutes are necessary for consideration by the Court, then the same shall be furnished and may become part of the record on this appeal.

IT IS FURTHER STIPULATED AND AGREED that exhibits, if any, need not be made part of

Stipulation Dispensing With Reproducing of Exhibits and Minutes of Adjournment

the record, that originals will be submitted to the Court at or before the call of the Calendar.

Dated: New York, New York
January 9, 1970.

s/ Irving Anolik
Attorney for Defendant-Appellant

s/ Frank S. Hogan by Lewis R. Friedman
Attorney for Respondent

Order of Appellate Term Appealed From With Dissenting Memorandum

Appellate Term - First Department
Dated - July 15, 1971

97 PEOPLE, & CO., res. v. SAUL HELLER, def-ap -

Judgment of conviction affirmed. No opinion.

Streit, J.P. and Quinn, J. concur.

Markowitz, J. dissents in the following dissenting memorandum.

Whether the film before us is obscene is a question of constitutional judgment — a mixed question of fact and constitutional law — calling upon the court to make an appraisal of the film and its contents against the requirements embodied in both the State and Federal constitutions (People v. Richmond County News, 9 N.Y. 2d 578, 581).

Sex and obscenity are not synonymous (Roth v. United States, 364 U.S. 476, 487). The problem of drawing "the dim and uncertain line" between proscribed obscenity and constitutionally protected expression is indeed thorny — and I recognize that this film may possibly be found to be utterly without redeeming social value. However, under the guidelines established by the United States Supreme Court and our Court of Appeals (Memoirs v. Massachusetts, 383 U.S. 413. Roth v. United States, supra, 354 U.S. 476; People v. Solomon, 26 N.Y. 2d 631, aff'g determination

Order of Appellate Term Appealed From With Dissenting Memorandum

of this court, September, 1967, No. 351, N.Y.L.J., Feb. 17, 1968; see also People v. Weingarten, 25 N.Y. 2d 639), I am, despite personal predilections, constrained to find that the film is not obscene.

I therefore dissent and vote to reverse the conviction and to dismiss the complaint.

Opinion of the Court of Appeals, State of New York
(Filed December 1, 1971)

STATE OF NEW YORK
COURT OF APPEALS

App. T. 1. No. 184. 71
The People &c.,
Respondent,
vs.
Saul Heller,
Appellant.

BERGAN, J.:

The film "Blue Movie," subject of this prosecution under Penal Law, Section 235.05, is simple pornography unrelieved by any merit. Acts of sexual intercourse are portrayed, actual or simulated, accompanied by a series of sexual manifestations and movements.

The elements which must be established to satisfy the constitutional protection afforded by the First Amendment to freedom of expression as laid down by Roth v. United States (354 U.S. 476) are established in this prosecution. The statute itself meets the Roth standards (Overstock Book Co. v. Barry, 436 F.2d 1289 [2d Cir., 1970]).

Those elements justifying prosecution by the State and meeting Federal constitutional requirements are that the dominant theme of the production as a whole appeals to prurient interest in

sex; is patently offensive as an affront to community standards; and is without redeeming social value (Redrup v. New York, 386 U.S. 767 [1967]; Memoirs v. Massachusetts, 383 U.S. 413 [1966]; Jacobellis v. Ohio, 378 U.S. 184 [1964]).

There are, of course, a number of cases holding that in particular publications or films these tests were not met and prosecution would not lie. A recent example is Cain v. Kentucky (397 U.S. 319) where the Court of Appeals of Kentucky (437 S.W. 2d 769) was reversed. It is not fruitful, however, by detailed differentials addressed to values that are better or worse, or to explicit or less explicit sexuality, to find guidance in deciding obscenity cases. Decision cannot reasonably be grounded on adding and subtracting obscenity points, one case to another.

The needs of adjudication must, as a practical matter, be met by such mature and objective judgment as judges are able to bring to it. A majority of this court, having viewed the film, is in agreement with the trial court and the Appellate Term that the film is obscene, and that prosecution is not interdicted by the First Amendment.

Appellant argues also that before the warrants issued for the seizure of the film and for his arrest, he was entitled to an adversary hearing before the judge who issued them on the question of the film's obscenity.

The procedure followed here was that the judge attended the public theatre at which the firm was

exhibited and, on seeing it, concluded there was probable cause to institute prosecution and issued the warrants.

This independent judicial action met fully the basic rule laid down in Marcus v. Search Warrants (367 U.S. 717) as later analyzed in the several opinions in A Quantity of Books v. Kansas (378 U.S. 205); that the seizure of evidence as obscene, and arrests on this ground, should not be left to the judgment of policemen, but should have judicial supervision.

It was noted, on this issue in Marcus, that the warrants for a very large number of magazines and books (11,000 copies) were issued "on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials" (pp. 731-732). That is certainly not this case. The warrants involved here were preceded by judicial scrutiny and were the result of judicial determination.

The additional question is whether the scrutiny should have been followed by an adversary hearing. The Supreme Court has not held that; and its most recent comment on the problem suggests it is not moving in that direction (Lee Art Theatre v. Virginia, 392 U.S. 636 [1967]).

There a Virginia conviction was reversed on authority of Marcus (supra). Not only was there no judicial scrutiny in advance, but the policeman's affidavit, used as a basis for the warrant, was both subjective and general. There was an

absence of "any inquiry by the justice of the peace into the factual basis for the officer's conclusions" (p. 637). Of course, that was not enough under Marcus.

But what is of relevancy for the present case is the observation by the Supreme Court that "we need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the warrant" (p. 637). This implies that had the justice done so, as the judge in the present case did, it would have been sufficient. There is no suggestion that an adversary hearing, an extreme departure from standard American practice on warrants, would also have been required.

Thus the decisions of the Second Circuit in Astro Cinema Corp. v. Mackell (422 F.2d 293 [1970]) and Bethview Amusement Corp. v. Cahn (416 F.2d 410 [1969], cert. den. 397 U.S. 920), requiring adversary hearings before warrants are issued, go beyond any requirement imposed on State courts by the Supreme Court.

There are intrinsic procedural difficulties in requiring such hearings. The usual reason for an adversary hearing before a magistrate as to whether a warrant should or should not issue arises from a close issue as to whether there is a real basis in fact for probable cause to begin a prosecution.

But when a magistrate sees a film, it is not much help to him, or indeed to the parties, in deciding probable cause to have counsel on one

side tell him what he has just seen is obscene and on the other that it is not. He is deciding, on the warrant question, not guilt or innocence, but the prima facie sufficiency of ground to prosecute based on probable cause. The legal issue of obscenity on the merits of the charge can quickly be determined when the prosecution begins by appropriate motion.

There is a difference, too, in the impact of a wide-ranging warrant such as that in Marcus (supra) for the seizure of 11,000 publications which could amount to actual suppression of expression, and a single film which at the initial stage of the prosecution is taken merely as evidence until there has been a final adversary determination on the merits that it violates the statute.

The order should be affirmed.

Opinion of the Court of Appeals of the State of New York, Fuld, Ch. J. Dissenting

COURT OF APPEALS

[Same Title]

FULD, CH. J. (dissenting):

If I were to judge the film before us in terms of my personal views of its social value, of its moral and aesthetic worth, I would condemn it for

its vulgarity no less than for its banality.* However, as we declared some years ago in People v. Richmond County News (9 N.Y.2d 578, 587-588), "[b]asic principles of jurisprudence * * * command us to put to one side all personal predilections." Faithful to this injunction, I cannot but conclude that, in the light of First Amendment concepts, as reflected in the decisions of the Supreme Court (see, e.g., Cain v. Kentucky, 397 U.S. 319, revg. ___ Ky. ___, ___, 437 S.W.2d 769, 774-775; Redrup v. New York, 386 U.S. 767), the motion picture under consideration, explicit though it is in exhibiting acts of sexual intercourse, may not be stamped as obscene. So concluding, I do not reach the further question concerning the necessity for an adversary hearing prior to the court's issuance of a warrant for the film's seizure.

* * * * * *

Order affirmed. Opinion by Bergan, J. All concur except Fuld, Ch. J., who dissents and votes to reverse in an opinion in which Gibson, J., concurs.

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* It should be noted that no person under 18 years of age was ever admitted to the theatre where the picture was shown and that there was no claim of pandering or exploitation of its sexual content.